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Supreme Court of the United States

OCTOBER TERM, 1984

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY
and TEXACO INC.,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

An ultimate question presented is whether defendants, petitioners herein, are entitled to effective appeal of a district court's order to disclose to the general public confidential, pretrial material produced under compulsory process. Meaningful appeal of that ruling, which significantly expands the scope of public access in private civil litigation, had been secured by the District Court's entry of a stay pending appeal. The immediate questions itemized below arise from separate appeals of the stay pending appeal taken by a newspaper claiming constitutional rights of public access and disclosure. Defendants-petitioners have been deprived of due process rights to be heard on the appeal of the stay by the Court of Appeals' disregard for the Federal Rules of Appellate Procedure promulgated by this Court.

1. Whether a final judgment by a Court of Appeals on a petition for an extraordinary writ is subject to Federal Rules of Appellate Procedure 41(a), thereby protecting further appeals by a stay of the mandate upon the timely filing of a petition for rehearing.

2. Whether a Court of Appeals may grant a petition for a writ of mandamus *ex parte*, and deny respondents an opportunity to answer said petition pursuant to appellate Rule 21(b).

3. Whether a Court of Appeals may grant a petition for a writ of mandamus *ex parte*, arbitrarily denying oral argument in violation of appellate Rule 34(a).

4. Whether the power of mandamus is available to overturn a District Court's discretionary decision to enter a stay pending appeal.

PARTIES IN THE NINTH CIRCUIT

The petitioner in the Ninth Circuit mandamus docket, No. 84-7262, was Dow Jones & Co. Inc. The respondents included: Atlantic Richfield Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Phillips Petroleum Company, Shell Oil Company, Standard Oil Company of California, Texaco Inc., the State of Arizona, the State of California, the State of Florida, the State of Oregon, the State of Washington and the City of Long Beach, California. The United States District Court for the Central District of California, Honorable William P. Gray, was a nominal party.

Although not parties below, this petition makes the United States Court of Appeals for the Ninth Circuit, Circuit Judges Schroeder, Alarcon and Ferguson, nominal parties herein against whom relief is requested.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THE NINTH CIRCUIT	ii
TABLE OF AUTHORITIES	vi
THE OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
Summary Of Proceedings In The District Court	3
Proceedings In The Court Of Appeals	6
REASONS FOR ISSUING THE WRIT	10
I. THE ACTIONS BELOW INVOLVE IMPORTANT QUESTIONS VITAL TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS; RESOLUTION OF A CONFLICT BETWEEN CIRCUITS CAN BE ACHIEVED BY EXERCISING JURISDICTION OVER THIS MATTER	10
II. PETITIONERS' EFFORTS TO OBTAIN ADEQUATE RELIEF FROM THE COURT BELOW WERE UNSUCCESSFUL IN OBTAINING EVEN A HEARING ON THE STAY ISSUE	12
III. BY ACTING *EX PARTE* AND IN VIOLATION OF APPELLATE RULES 21(b) AND 34(a), THE COURT OF APPEALS DENIED DUE PROCESS TO PETITIONERS AND EXCEEDED ITS JURISDICTION UNDER THE ALL WRITS ACT	13

TABLE OF CONTENTS—Continued

Page

IV. THE MANDATE OF THE JUNE 19 ORDER ISSUED IN VIOLATION OF APPELLATE RULE 41(a) 16

V. THE COURT OF APPEALS EXCEEDED ITS JURISDICTION IN VACATING THE DISTRICT COURT'S DISCRETIONARY DECISION TO STAY DISCLOSURE PENDING APPEAL 20

A. The Standards For Issuance Of A Writ Were Not Met 20

B. The Petition For Rehearing Should Have Been Granted Because, By Acting *Ex Parte*, The Court Of Appeals Necessarily Overlooked Significant Points Of Fact And Law 22

C. The District Court Did Not Abuse Its Discretion In Entering A Stay To Preserve The Status Quo Pending Appeal 24

1. The Balance Of Interests Strongly Favors Maintenance Of The Stay Pending Appeal 25

2. Defendants Are Likely To Succeed On The Merits Of The Disclosure Appeal 26

CONCLUSION 30

APPENDICES

APPENDIX A—Order of the Court of Appeals, June 19, 1984, Docket No. 84-7262 ..... A-1

APPENDIX B—Order of the District Court, entered April 12, 1984, Docket MDL 150 ..... B-1

Memorandum of Decision of the District Court, February 9, 1984, entered April 12, 1984, Docket MDL 150 ..... B-4

TABLE OF CONTENTS—Continued

		Page
	Memorandum to Counsel of the District Court, April 12, 1984, Docket MDL 150	B-24
APPENDIX C—	Memorandum and Order Re Effect of Stay of the District Court, September 6, 1984, Docket MDL 150	C-1
APPENDIX D—	Order of the Court of Appeals, June 19, 1984, Docket No. 84-5824	D-1
APPENDIX E—	Order of the Court of Appeals, June 19, 1984, Docket No. 84-8076	E-1
APPENDIX F—	Stipulation and Order of the District Court, August 23, 1984, Docket MDL 150	F-1
STATUTORY APPENDIX		SA-1
APPENDIX OF AFFILIATED COMPANIES		1a

TABLE OF AUTHORITIES

CASES

	Page
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	21
Antonelli v. Federal Bureau of Investigation, 553 F. Supp. 19 (N.D. Ill. 1982)	22, 25
Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953)	20, 21
Becker v. United States, 451 U.S. 1306 (1981)	20
Bridge C.A.T. Scan Associates v. Technicare Corp., 710 F.2d 940 (2d Cir. 1983)	11, 18
Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984)	27
Cianci v. New Times Publishing Co., 88 F.R.D. 562 (S.D.N.Y. 1980)	27
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	6
Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (10th Cir. 1980)	22
Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U.S. 212 (1922)	20, 22
De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945)	20
Erie Bank v. United States District Court, 362 F.2d 539 (10th Cir. 1966)	2
Ex parte Peru, 318 U.S. 578 (1943)	2, 18
Ex parte United States, 287 U.S. 241 (1932)	2
Federal Trade Commission v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980)	21
Globe Newspaper Co. v. Superior Court for County of Norfolk, 457 U.S. 596 (1982)	29
In re "Agent Orange" Product Liability Litigation, 98 F.R.D. 539 (E.D.N.Y. 1983)	27
In re Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977)	20
In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984)	6, 22, 23, 24

TABLE OF AUTHORITIES—Continued

	Page
In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 Fed. R. Serv. 2d 1251 (N.D. Cal. 1974)	28
In re Letters Rogatory from Tokyo District, 539 F.2d 1216 (9th Cir. 1976)	21
In re Oliver, 333 U.S. 257 (1948)	23, 24
In re Petroleum Products Antitrust Litigation, 419 F. Supp. 712 (J.P.M.L. 1976), and 393 F. Supp. 1091 (J.P.M.L. 1975)	3
In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981)	26, 27
In re Thorp, 655 F.2d 997 (9th Cir. 1981)	7
In re Winship, 397 U.S. 358 (1970)	29
International Products Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963)	28
Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983)	27
Katz v. King, 627 F.2d 568 (1st Cir. 1980)	21
Kerr v. United States District Court for Northern District, 426 U.S. 394 (1976)	20
Krause v. Rhodes, 434 U.S. 1335 (1977)	22
La Buy v. Howes Leather Co., 352 U.S. 249 (1957)	2, 17, 18
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	18
Martindell v. International Telephone & Telegraph Corp., 594 F.2d 291 (2d Cir. 1979)	28
McClellan v. Carland, 217 U.S. 268 (1910)	2
McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982)	21
National Polymer Products, Inc. v. Borg-Warner Corp., 641 F.2d 418 (6th Cir. 1981)	27
Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979)	22, 25, 26, 28
Reed v. Rhodes, 472 F. Supp. 603 (N.D. Ohio 1979)	25
Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 537 F. Supp. 1036 (E.D. Pa. 1982)	28

TABLE OF AUTHORITIES—Continued

Page

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 23, 29
Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984) 2, 4, 12, 25, 28, 29, 30
Schlagenhauf v. Holder, 379 U.S. 104 (1964) 2
Tavoulareas v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984), *vacated and reh'g en banc granted* (March 15, 1984), *remanded* (June 25, 1984) 27
Times Newspapers Ltd. v. McDonnell Douglas Corp., 387 F. Supp. 189 (C.D. Cal. 1974) 27
Turner v. Woods, 559 F. Supp. 603 (N.D. Cal. 1982), *aff'd*, 707 F.2d 1109 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 1412 (1984) 24
United States v. Dorfman, 690 F.2d 1230 (7th Cir. 1982) 22
United States v. First National Bank, 619 F.2d 774 (8th Cir. 1980) 21
United States v. South Bend Community School Corp., 692 F.2d 623 (7th Cir. 1982), *aff'd*, 710 F.2d 394 (1983), *cert. denied*, 104 S. Ct. 1707 (1984) 21
Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) 24, 25
Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1980) 23, 27, 28
Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) 17, 18, 20, 21
Will v. United States, 389 U.S. 90 (1967) 2, 17, 18, 20, 21
Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 529 F. Supp. 866 (E.D. Pa. 1981) .. 23, 27, 28

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 13

TABLE OF AUTHORITIES—Continued

STATUTES Page

28 U.S.C. § 1291 ..... 6, 19
28 U.S.C. § 1291(b) 6
28 U.S.C. § 1292(b) 15, 19
28 U.S.C. § 1407 3
28 U.S.C. § 1651 18
28 U.S.C. § 1651(a) 2, 3, 7, 13, 16, 22
28 U.S.C. § 2071 ..... 3, 19
28 U.S.C. § 2077 ..... 3, 19

RULES

Supreme Court Rule 44.4 22
9th Cir. R. 3(a)-(b) 3, 14
9th Cir. R. 22 ..... 3, 19
FED. R. APP. P. 1 ..... 14, 17
FED. R. APP. P. 8(a) 21, 22
FED. R. APP. P. 21(b) 1, 3, 6, 10, 12, 13, 14, 15
FED. R. APP. P. 34(a) 1, 3, 10, 13, 14
FED. R. APP. P. 40 ..... 3, 17
FED. R. APP. P. 40(a) 6, 23
FED. R. APP. P. 41 ..... 1, 10, 11, 16, 17, 19
FED. R. APP. P. 41(a) 1, 3, 6, 7, 8, 11, 16, 17, 18, 19
FED. R. APP. P. 41(b) 17
FED. R. APP. P. 45(c) 3, 19
FED. R. APP. P. 47 ..... 3, 19
FED. R. APP. P. Title VII (Rules 25-48) 11
FED. R. CIV. P. 1 ..... 12, 27
FED. R. CIV. P. 26(c) 3, 5, 27

MISCELLANEOUS

Marcus, *Myth and Reality In Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983) 28
9 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 110.26 (2d 1983) 18, 21
9 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 110.27 (2d 1983) 17

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of mandamus issue to the United States Court of Appeals for the Ninth Circuit directing it (1) to vacate its final judgment of June 19, 1984, granting a petition for mandamus *ex parte* and in violation of appellate Rules 21(b) and 34(a), (2) to recall the mandate of said *ex parte* judgment as issued improvidently and in violation of Rule 41, and (3) to grant a timely-filed petition for rehearing of said *ex parte* judgment. In the alternative, petitioners respectfully request a writ directing the Court of Appeals to maintain a stay of document disclosure pending the appeal of an important District Court decision approving public access to sealed civil pretrial material.

The District Court decision whose appeal this petition seeks to protect raises questions of first impression involving the application of common law and First Amendment rights to the pretrial phase of civil litigation, and the corollary scope of protective orders. In addition, certain issues involving administration of the Federal Rules of Appellate Procedure raised in this petition have not previously been addressed by any federal court. One question—whether appellate Rule 41(a) applies to proceedings for extraordinary writs—needs to be addressed by this Court in order to resolve a clear conflict between the Ninth and Second Circuits and to achieve consistent administration of justice.

THE OPINIONS BELOW

The Order of a panel of the United States Court of Appeals for the Ninth Circuit, Schroeder, Alarcon and Ferguson, J.J., No. 84-7262, June 19, 1984, is in APPENDIX A. The appendices also include the Opinion and Order to disclose confidential material, and stay of said disclosure pending appeal, of the United States District Court for the Central District of California, Multi-

district Litigation Docket 150-WPG, entered April 12, 1984, part of which was on appeal in Ninth Circuit No. 84-7262 (reviewing only the stay pending appeal) and is on appeal in 84-5878 (reviewing the disclosure ruling). APPENDIX B. An order of the District Court, MDL 150-WPG, September 6, 1984, implementing the Court of Appeals' June 19 Order, is APPENDIX C. Three related orders not directly sought to be reviewed are in APPENDICES D-F.

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to confine the United States Court of Appeals to a lawful exercise of its prescribed jurisdiction and thereby preserve both the appellate jurisdiction of said Court of Appeals and the prospective appellate jurisdiction of this Court over important questions. *Ex Parte Peru*, 318 U.S. 578, 582-83 (1943); *Ex Parte United States*, 287 U.S. 241, 246 (1932); *McClellan v. Carland*, 217 U.S. 268 (1910). In addition, this Court has jurisdiction under 28 U.S.C. § 1651(a) to exercise general supervisory control over inferior federal courts. *Will v. United States*, 389 U.S. 90, 107 (1967) (writ of mandamus "serves a vital and didactic function"); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Exercise of this Court's supervisory authority is particularly appropriate where, as here, there is a pattern of disregard of appellate rules essential to preservation of due process. This pattern raises "basic, undecided question[s]" whose resolution can "settle new and important problems" involving the administration of justice within the federal courts. *Schlagenhauf v. Holder*, 379 U.S. at 110-11. Exercise of jurisdiction under 28 U.S.C. § 1651(a) also is appropriate to prevent the Court of Appeals from proceeding contrary to the analysis of the recent decision of this Court in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984). *See Erie Bank v. United States District Court*, 362 F.2d 539 (10th Cir. 1966).

STATUTORY PROVISIONS INVOLVED

This case directly concerns exercise of authority by the Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a), and non-compliance with Rules 21(b), 34(a) and 41(a) of the Federal Rules of Appellate Procedure. These provisions are set forth in the Statutory Appendix, along with related Appellate Rules 40, 45(c) and 47, 28 U.S.C. §§ 2071, 2077, and Rules 3(a)-(b) and 22 of the Rules of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Summary of Proceedings In The District Court

This petition arises from Multidistrict Litigation Docket ("MDL") 150, encompassing six private antitrust actions consolidated for pretrial in the Central District of California, before The Honorable William P. Gray, pursuant to 28 U.S.C. § 1407.[1] Defendants, also petitioners herein, refine crude oil and market petroleum products. Plaintiffs are five states—Arizona, California, Florida, Oregon and Washington—and the City of Long Beach, California, each suing as a purchaser of petroleum products or as a seller of crude oil, alleging nationwide conspiracies affecting prices. Plaintiff-intervenor Dow Jones & Company, Inc. ("Dow Jones") publishes The Wall Street Journal. None of the cases is yet scheduled for trial.

Plaintiffs' broad discovery requests have been accommodated efficiently only through entry of an agreed-upon umbrella protective order, pursuant to FED. R. CIV. P. 26(c). By this device, commonly used in complex civil litigation, time-consuming evaluation of private files for

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[1] *In re Petroleum Products Antitrust Litigation*, 419 F. Supp. 712 (J.P.M.L. 1976), and 393 F. Supp. 1091 (J.P.M.L. 1975). Petitioners, who are defendants in the District Court and appellants (No. 84-5878) or respondents (No. 84-7262) in the Ninth Circuit, are more fully identified in the Appendix of Affiliated Corporations.

specific confidentiality and item-by-item judicial resolution of disputes are avoided, or at least deferred, by permitting the producing party initially to designate materials as "confidential." Designated material may be disclosed only to persons working directly on the cases, thus prohibiting disclosure prior to trial to the public or to the business personnel of competitors named as co-defendants. Designated information filed with the court must be submitted under seal.[2] Since its entry in 1977, parties and third parties have acted in reliance on this protective order.[3]

This controversy arose when Dow Jones intervened in one case seeking access to all protected discovery. The newspaper claimed no special right of access as a member of the press but sued as a member of the public, asserting that pretrial discovery was presumptively open to the public under the First Amendment and the common law tradition of public trials.[4] Dow Jones' request was

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[2] The MDL 150 Protective Order specifies procedures by which any party may challenge a designation and seek declassification of specifically identified material. It is not an impediment to introducing evidence at a public trial and its does not restrict use or dissemination of the same information, if obtained from a source independent of discovery. *See Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984).

[3] In reliance on the protective order, defendants-petitioners and third parties have produced millions of pages of documents and submitted to over 500 depositions, without pressing legitimate objections to intrusive discovery requests; the parties have settled two cases and former defendants have settled out of pending cases; sealed briefs and attachments have been submitted to the District Court.

The body of material filed under seal is the focus of the present disclosure controversy. The MDL 150 proceeding, however, is conducted mainly in public. As of September, 1983, approximately 115 out of 3,875 filings with the District Court had been submitted under seal. Approximately 250 written orders have been issued in MDL 150, all public, many published, and some pursued on appeals. All hearings—more than 120—have been public.

[4] The District Court initially treated Dow Jones' request as premature and deferred final action. Dow Jones twice petitioned the

granted in a decision dated February 9, 1984, that was finalized by order entered April 12, 1984. APP. B.[5]

The District Court Opinion and Order directed disclosure of confidential, sealed materials filed at the courthouse, even though they had not been and might never be subject to trial or dispositive judicial ruling. Thus, it expanded the scope of access at the direct expense of protection under Rule 26(c), FED. R. CIV. P. The Order automatically defers actual disclosure for seventy days, giving producing entities an opportunity to identify and withhold from immediate disclosure any items that arguably rebut the strong presumption of access.[6] The Order is self-executing. Defendants-petitioners cannot prevent disclosure at the end of the seventy days by simply retaining the material. Any plaintiff, or the District Court, may then unilaterally release items to the general public.

After separate briefing and argument, the District Court stayed both disclosure and the seventy-day review procedure pending appeal. Order ¶ 6, APP. B-3. It determined that any implementation of its ruling would irreparably harm defendants and moot an appeal. APP. B-25. It described its ruling as "important and con-

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Court of Appeals for a writ of mandamus to compel the District Court to grant its renewed motion (No. 83-7634, 9th Cir., Aug. 17, 1983). That petition was denied once without calling for briefs and, upon renewal, was voluntarily dismissed after issuance of the District Court's decision.

[5] The appealed ruling is in three parts: (1) an Order entered April 12, 1984, ("Order") (APP. B-1); (2) a Memorandum of Decision dated February 9 and incorporated by reference into the Order (the "Opinion") (APP. B-4); and (3) a short Memorandum to Counsel commenting on appeal jurisdiction and entry of the stay pending appeal ("Mem. to Counsel") (APP. B-24).

[6] The District Court limited defendants' and third parties' right to demonstrate interests countervailing public access to trade secrets or actual commercial sensitivity leading to harm to a defendant's competitive position. APP. B-19-21. The opportunity to demonstrate burden, harassment, potential pretrial prejudice, privacy and other recognized countervailing interests was denied, *id.*, and that denial is on appeal.

troversial" and one that should be "authoritatively resolved" on appeal. *Id.* Defendants timely filed a notice of appeal on April 26, 1984, Ninth Cir. No. 84-5878.[7]

Proceedings in The Court Of Appeals

In an apparent attempt to moot defendants' appeal, the newspaper-intervenor attacked the stay in the Ninth Circuit by initiating three separate appeals of the stay.[8] Its petition for a writ of mandamus to vacate the stay, filed April 20, 1984, ER 1-40, was granted, summarily and *ex parte*, on June 19, 1984. APP. A-1. The record then before the panel consisted solely of Dow Jones' one-sided petition, because of the restrictions of Rule 21(b), FED. R. APP. P.[9]

Defendants filed a petition for rehearing, pursuant to FED. R. APP. P. 40(a), on June 26, 1984. ER 61. It included a suggestion for rehearing *en banc* and a petition for permission to file a responsive brief pursuant to Rule 21(b) and for oral argument. Defendants reasonably believed that the effect of the June 19 Order to issue a writ was automatically stayed, pursuant to FED. R. App. P.

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[7] Appeal of the interlocutory order to disclose confidential documents lies under 28 U.S.C. § 1291 and the collateral order rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Mem. to Counsel, APP. B-24-25. *E.g., In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1307 (7th Cir. 1984) (interlocutory disclosure order "easily met" the *Cohen* test).

[8] Dow Jones' appeal under 28 U.S.C. § 1291 was dismissed for lack of jurisdiction, on defendants' motion, by order of June 19, 1984 (No. 84-5824). APP. D-1. Dow Jones' petition for permissive review under 28 U.S.C. § 1291(b) was denied, after briefing of the jurisdictional issue, on June 19, 1984 (No. 84-8076) without reaching the merits. APP. E-1.

[9] An answer by certain plaintiffs, supporting Dow Jones' request, was rejected by the Ninth Circuit on May 10 because no order under Rule 21(b) permitting answers had issued. On May 14, plaintiffs filed a motion for permission to file that answer. ER 50. Defendants opposed but, in the alternative, asked for an opportunity to file an answer. ER 53. These motions were pending when the panel issued its final judgment on June 19, 1984. An Appendix of Excerpts of Record ("ER") will be separately submitted.

41(a), by the timely filing of the petition for rehearing, leaving in place the District Court's stay pending appeal. Defendants recited this determination in the petition for rehearing. ER 73.

Between August 15 and 21, 1984, defendants learned that plaintiffs interpreted the June 19 Order as immediately effective in vacating the stay pending appeal. ER 150-162. Dow Jones and plaintiffs asserted the view that appellate Rule 41(a) does not apply to proceedings on petitions for extraordinary writs, making the absence of a mandate irrelevant. ER 161. Under this view disclosure would be proper and would occur on August 28—seventy days after June 19.

Reasonably believing that unlawful disclosure was imminent, defendants applied to the District Court on August 22 for a temporary restraining order and preliminary injunction to maintain the status quo pending resolution of the status of the District Court's stay pending appeal. The District Court, Honorable A. Wallace Tashima presiding in Judge Gray's absence, after a brief hearing, entered a stipulated order on August 23 that kept the original stay pending appeal in effect until September 6, 1984. APP. F. Judge Tashima warned defendants that preliminary injunctive relief would likely be denied for lack of District Court jurisdiction and strongly advised the parties to take the matter of the status of the stay to the Ninth Circuit for expedited resolution prior to September 6.[10] Dow Jones cross-moved on August 29 for an order to unseal the District Court's record.

On August 28, 1984, defendants filed an emergency request for relief pursuant to 28 U.S.C. § 1651(a) with the Ninth Circuit. ER 103-165. In addition to resolution

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[10] The District Court had jurisdiction under 28 U.S.C. § 1651(a) to protect its record so as to preserve the two pending appeals in the Ninth Circuit. *E.g., In re Thorp*, 655 F.2d 997, 998 (9th Cir. 1981) (District Court is divested of jurisdiction over subject matter of pending appeal "except in aid of [appeal] jurisdiction").

of the status of the stay pending appeal under Rule 41 (a), defendants requested relief necessary to prevent disclosure so as to preserve jurisdiction over the petition for rehearing of the *ex parte* June 19 Order.[11] Defendants alternatively requested independent entry of a stay pending the appeal in No. 84-5878. Such an order would have superceded the controversy arising from the June 19 Order. Despite defendants' request, the Ninth Circuit did not rule by September 6.

During this time, all parties had assumed that no mandate implementing the June 19 Order had issued from the Ninth Circuit. On September 5, defendants learned for the first time that a certified copy of the June 19 Order, identified as a mandate, had been "lodged" in the District Court MDL 150 docket on June 21, 1984. On the same date staff at both the District Court and Court of Appeals' clerk's offices reported their understanding that issuance of this document as a mandate may have been a mistake and that the timely filing of the petition for rehearing in Ninth Circuit No. 84-7262 should have or did stay the mandate, and that the Ninth Circuit clerk's office would clarify this situation immediately.

On September 6, at the hearing on the motion for preliminary injunction, the District Court took judicial notice of the issuance of a mandate and stated its understanding that it may have issued as a result of "clerical error." APP. C-4. Judge Tashima took the view that, regardless of clerical error or any legal infirmity in the issuance of a mandate in violation of Rule 41(a), the District Court must accept the mandate at face value and treat the stay pending appeal as vacated; any remedies to rectify or change the resulting inequitable circumstance would properly be addressed to the Ninth Circuit.

The District Court ordered that the mandate, heretofore merely lodged, be filed and spread and further or-

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[11] Defendants sought, *inter alia*, an order granting the petition for rehearing and vacating the June 19 Order pending rehearing and for seven days thereafter.

dered, in effect, that the stay of disclosure pending appeal be vacated as of September 6. APP. C-5-6. Under the provisions of the original Order (APP. B-1), this commenced the running of sixty and seventy-day periods leading to automatic disclosure. Defendants are now subject to obligation to complete a review, described by the District Court as "laborious and expensive" (APP. B-25), of the sealed items to be disclosed to the public in order to identify any that may be so commercially sensitive as to rebut the presumption of public access.[12] The terms of this review obligation are part of the appeal of the disclosure ruling, therefore defendants are now irreparably injured by loss of rights to an effective appeal, and this injury increases each day. Complete disclosure of most or all of the sealed material will occur automatically on November 15, 1984, completely mooting the appeal. The District Court expressed its expectation that the Court of Appeals would soon act if it disagreed with respect to the proper status of the stay pending appeal. APP. C-5.

On September 11, 1984, in light of the newly-discovered improvident issuance of the mandate, defendants filed in the Court of Appeals an emergency petition to recall the mandate and restore the status quo at least until disposition of the petition for rehearing in No. 84-7262. ER 232. Defendants sought this relief, along with the relief requested in the now-foreclosed August 28 Emergency Petition, by September 17. After that date, the ongoing injury through loss of the stay is at a point that makes grant of the relief requested less than sufficient to permit full and effective review of the portion of the District Court Order setting forth the review procedure.

Defendants' petition for rehearing and the August 28 emergency petition are now foreclosed by the issuance

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[12] Because of the terms of the MDL 150 umbrella protective order, most of the sealed items had not previously been required to be reviewed for purposes of identifying specific confidentiality and, therefore, had not been so reviewed.

and implementation of the mandate. APP. C-5. Briefing of the important merits disclosure appeal will be completed in early November.[13] It is, therefore, no longer possible for that merits disclosure appeal to be decided before actual disclosure is complete on November 15. Because immediate relief is necessary to preserve those portions of the appeal not already lost, defendants-petitioners have separately filed this date (1) an application to the Circuit Justice for the Ninth Circuit to stay the disclosure order pending disposition of this petition and (2) an alternate motion to accelerate consideration of this petition.

REASONS FOR ISSUING THE WRIT

I. THE ACTIONS BELOW INVOLVE IMPORTANT QUESTIONS VITAL TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS; RESOLUTION OF A CONFLICT BETWEEN CIRCUITS CAN BE ACHIEVED BY EXERCISING JURISDICTION OVER THIS MATTER

The actions in conflict with appellate rules indicate a need for review that goes beyond the specific injury to petitioners. The evidence in the Court of Appeals is that the violations of appellate rules now complained of are not specific to this matter but represent unpublished custom and practice of the Ninth Circuit. Moreover, the three appellate rules at issue are not ministerial but embody and confer rights vital to the preservation of due process. The right to be heard against the petition of an adversary, the concern of Rules 21(b) and 34(a), and the right to pursue appellate review from judgments of the Court of Appeals, the concern of Rule 41, warrant vigilant supervision by this Court. If such rights may be foreclosed by unpublished practice, then a serious

[13] Appellants' (defendants') brief was filed August 27; the last Appellees' brief is due October 12; Appellants' reply brief is due 21 days after service of the last appellee brief (no later than November 5).

threat to the administration of justice in the Ninth Circuit exists.

The Ninth Circuit practice to treat petitions for extraordinary writs as outside the scope of Rule 41(a) is in direct conflict with the Second Circuit. *See Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 947 (2d Cir. 1983) (applying appellate Rule 41(a) in a mandamus proceeding). Moreover, if a general rule such as Rule 41 may be construed as inapplicable to some proceedings, then the scope of the many other "General Provisions" in the rules is doubtful—fostering more uncertain and capricious unpublished practices.[14] We assume that a practice to deny answers and arguments on petitions for extraordinary writs conflicts with practice in other circuits.

Similar injuries may have occurred and may recur but escape review for a variety of reasons—including lack of time for injured litigants to react effectively. The unique circumstances of this case have combined to permit reaction, and present an opportunity for this Court to examine important matters capable of repetition but usually evading review. Time, however, is pressing defendants and only prompt action by this Court can preserve review over these important due process matters, resolve the clear conflict respecting Rule 41, and preserve review over the underlying public access appeal which defendants seek to protect from becoming moot.

The issue raised by the underlying appeal is itself sufficiently important to warrant this Court's action to preserve appellate jurisdiction. As set forth below, it draws a line of controversy between privacy rights and public access rights, both of constitutional dimension, at a place not heretofore addressed by this Court. The decision in

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[14] Title VII, Rules 25-48, of the Federal Rules of Appellate Procedure are "General Provisions" that, therefore, do not specifically state that they apply, *inter alia*, to proceedings for extraordinary writs. See page 17 and note 19 below.

Seattle Times Co. v. Rhinehart comes very close to the area of controversy but did not address pretrial material filed at the courthouse as distinct from raw discovery. The viability of protective orders, essential "to secure the just, speedy and inexpensive determination of every action," FED. R. CIV. P. 1, is threatened by the analysis below. That analysis removes any check on improper use of lawsuits to obtain and publish private information or to harass litigants by threat of such publication. These discovery devices are themselves vital to the efficient administration of justice, warranting scrutiny by this Court. Potential jurisdiction over these important issues will be lost absent prompt action from this Court.

The focus of the circumstances below is an exercise of the office of mandamus over a discretionary decision to enter a stay pending appeal. The Court of Appeals' interference with that discretionary decision represents an exercise contrary to decisions of this Court (see pages 20-22 below) that, if not checked, will lead to inconsistent treatment of such stays within a federal system that depends on even-handed treatment of litigants.

II. PETITIONERS' EFFORTS TO OBTAIN ADEQUATE RELIEF FROM THE COURT BELOW WERE UNSUCCESSFUL IN OBTAINING EVEN A HEARING ON THE STAY ISSUE

Petitioners have pursued all lawful and practicable means in the courts below to obtain a stay pending appeal of an important public access decision. On the only occasion when the matter was briefed by both sides, the standards for entry of a stay were determined to be met and a stay was entered by the District Court. Defendants sought to be heard in answer to the petition for mandamus to vacate the stay, but were barred from initiating a response by appellate Rule 21(b). Upon issuance of the *ex parte* order to vacate the stay, defendants timely filed a petition for rehearing. Defendants reacted promptly to the unexpected, threatened disclosure based on the *ex parte* order by promptly seeking injunc-

tive and other emergency relief, pursuant to 28 U.S.C. § 1651(a), from both the District Court and the Court of Appeals. Upon the discovery of and the filing and spreading of the unlawfully issued mandate in September, defendants promptly moved the Court of Appeals to recall the mandate.

Despite a duty to do so in order to preserve its jurisdiction and to avoid substantial injustice to petitioners, the Ninth Circuit declined to rule within a time when relief would have been effective on (1) defendants' petition for rehearing, (2) defendants' emergency petition for relief in aid of jurisdiction. It has similarly failed to rule on defendants' emergency petition to recall the mandate. The *ex parte* order of June 19, 1984, has been implemented without possibility of ordinary appeal, eliminating the stay pending appeal approved by the District Court. There are no further requests that defendants could make to the Court of Appeals that were not encompassed by the three post-final petitions and now foreclosed by the inadvertent or improvident issuance of the mandate. Defendants only practicable means of obtaining a hearing on the appeal of the stay pending appeal (No. 84-7262), and thereby protect jurisdiction over the important appeal in No. 84-5878, is through extraordinary review by this Court.

III. BY ACTING *EX PARTE* AND IN VIOLATION OF APPELLATE RULES 21(b) AND 34(a), THE COURT OF APPEALS DENIED DUE PROCESS TO PETITIONERS AND EXCEEDED ITS JURISDICTION UNDER THE ALL WRITS ACT

In issuing a final judgment *ex parte*, the Court of Appeals acted in violation of the Due Process Clause and Rules 21(b) and 34(a), FED. R. APP. P. The result was an order that thwarts, rather than aids, appellate jurisdiction over a disclosure ruling raising new and important issues—a serious abuse of the authority conferred by the All Writs Act. In declining to reconsider or cure the defects in its June 19 Order, the Court of Appeals

has impeded defendants' constitutional right to appeal the June 19 Order as well, compounding the misdirection of the mandamus power.

The appellate rules governing extraordinary writs explicitly provide that a writ of mandamus may not issue without first permitting respondents to be heard. Rule 21(b) provides in relevant part:

> (b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. *Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order* . . . . (Emphasis added.)

No such order issued. Indeed, in the absence of such a briefing order the Ninth Circuit clerk's office rejected filing of a brief by one group of respondents. Note 9 above.

Rule 21(b) also explicitly contemplates hearing oral argument on petitions for writs of mandamus. No argument was scheduled or heard, nor did the Court make the determinations necessary to dispense with oral argument under FED. R. APP. P. 34(a) and Ninth Circuit Rule 3(a)-(b). Appellate Rule 34(a), which is a general provision applicable to all proceedings in the courts of appeals,[15] requires oral argument "*in all cases* unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed." (Emphasis added.) It specifies a strict "minimum standard" to be met before oral argument can be foreclosed and even provides parties with an opportunity to be heard on the question whether to dispense with oral argument. The Ninth Circuit ignored both Rule 34(a) and its own local rule, further depriving defendants of their right to be heard.[16] Moreover, under the governing standards,

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[15] Rule 1, FED. R. APP. P., Advisory Committee Note.

[16] Ninth Circuit Rule 3(a)-(b) provides that oral argument "*will be allowed in each case* absent a specific finding . . . that oral argu-

oral argument could only have been denied if the petition for mandamus had been denied without briefing.

Dow Jones has argued that the June 19 Order was not *ex parte* because, in separate appeals, defendants allegedly filed briefs touching upon some issues relevant to Docket No. 84-7262. There can be no support for the proposition that briefs in other dockets could, under any circumstances, be deemed to satisfy defendants' due process right to be heard in response to a petition for mandamus. The circumstances of the briefs identified by Dow Jones demonstrate why such a result would be manifestly unfair.[17] Moreover, the suggestion that the panel issuing the June 19 Order considered these other briefs is rank speculation. Due process entitles defendants to decide what answer they will make to an adversary's petition and to have notice of the record on which final judgments are made.[18]

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ment is not needed." (Emphasis added.) SA-5. It provides for notice of any determination to deny oral argument, and of the reasons therefore, and allows the parties to argue for reconsideration of such a finding.

[17] The first alleged "response" was defendants' opposition to a motion to vacate the stay filed in No. 84-8076, in which Dow Jones unsuccessfully sought permissive review of the stay under 28 U.S.C. § 1292(b). That briefing addressed standards governing issuance of a stay pending appeal but explicitly did not address the central issues in the mandamus proceeding—whether the mandamus power is available to review and overturn a discretionary stay pending appeal and whether the stringent criteria for issuance of an extraordinary writ were satisfied on the facts and circumstances of this case. The appeal in No. 84-8076 was denied for lack of jurisdiction without reaching the motion to vacate the stay. APP. E. The second alleged "response" was filed January 4, 1984, in another mandamus proceeding raising completely different issues, *before* the instant dispute had arisen or could even be anticipated.

[18] To have considered items filed in other dockets without notice to the parties obviously would be unfair. If the Court of Appeals intended to or wished to consider briefs in related dockets, it would have notified all parties. If it wished to avoid repetition of matters discussed in other dockets, it could have said as much in an order pursuant to Rule 21(b).

Finally, in vacating the stay pending appeal, the Court of Appeals has exceeded its jurisdiction under 28 U.S.C. § 1651(a). That statute authorizes only writs "necessary or appropriate in aid of [the courts of appeals'] jurisdictions." Elimination of the stay necessarily jeopardized the appeal of the disclosure ruling in Ninth Circuit Docket No. 84-5878. The subsequent refusal by the Court of Appeals even to consider defendants' legitimate requests to appeal or preserve appeal of the June 19 Order also exceeded that authority.

IV. THE MANDATE OF THE JUNE 19 ORDER ISSUED IN VIOLATION OF APPELLATE RULE 41(a)

In order to protect litigants' rights to pursue reconsideration, modification and appellate review of final judgments in a court of appeals, appellate Rule 41(a) provides for an automatic stay of issuance of the mandate, unless otherwise ordered. The rule states in relevant part:

> The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. . . . The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court.

Had the Court of Appeals adhered to this rule, the District Court's stay pending appeal would have remained in effect pending disposition of the petition for rehearing, and the initial error—*ex parte* disposition of a petition for mandamus—could have been corrected.

Dow Jones claims that Rule 41(a) does not apply to the June 19 Order because the Rule "governs appeals" but not proceedings in mandamus. ER 180. The Court of Appeals apparently takes the same view. In support of its position that Rule 41 is no bar to immediate implementation of the June 19 Order, Dow Jones presented evidence of a practice of the Ninth Circuit to issue mandates immediately in all proceedings for extraordinary

writs. ER 212-13. Thus, without an authorizing order by the Court of Appeals—and without the notice that such order necessarily would imply—the Ninth Circuit Clerk's office issued the mandate immediately upon the filing of the June 19 Order. The parties remained unaware of this action until September.

Proceedings in mandamus plainly are encompassed by Rule 41. First, the language of the rule nowhere limits its application by the jurisdictional basis for the particular appeal.[19] Moreover, the position that Rule 41 does not apply to mandamus proceedings would create anomalies and gaps in the Federal Rules of Appellate Procedure.[20] For example, such position would illogically imply that defendants' petition for rehearing is impermissible and that review of a final judgment in a mandamus proceeding by writ of certiorari is not available.[21]

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[19] Rule 41 appears under the heading "Title VII. General Provisions," in contrast to other rules the "[a]s indicated by the titles under which they are found," apply only to specific types of proceedings, for example, those for extraordinary writs (Rule 21), or for review of *habeas corpus* proceedings and appeals in *forma pauperis* (Rules 22-24). Rule 1, FED. R. APP. P., Advisory Committee Note. Rule 41, therefore, applies to "all proceedings." *Id.*

[20] There are many provisions like Rule 41, that, being general, do not explicitly state that they apply to proceedings in mandamus, in bankruptcy, in *habeas corpus*, etc. Under the Ninth Circuit's approach, these rules (Rules 1-2, 25-48) would not apply to such proceedings.

[21] Petitions for rehearing are governed by appellate Rule 40, a rule as general as Rule 41(a). The position that Rule 41 does not apply to mandamus proceedings would imply that review by writ of certiorari is also unavailable. Rule 41(b), FED. R. APP. P. Yet this Court reviews final orders in mandamus proceedings by writ of certiorari. *E.g., Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 667 (1978); *Will v. United States*, 389 U.S. 90, 107 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 260 (1957); see 9 MOORE'S FEDERAL PRACTICE ¶ 110.27.

There is no tenable basis for concluding that a mandamus proceeding is not appellate in nature and, therefore, not governed by the general appellate rules.[22]

The Ninth Circuit's practice conflicts with that of the Second Circuit. In *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983), the Court of Appeals granted a petition for mandamus and vacated an order. It observed that "[the vacated] Order remains in effect until issuance of this Court's mandate which, pursuant to FED. R. APP. P. 41(a), will occur 21 days after entry of our judgment herein." 710 F.2d at 947. The Supreme Court itself routinely uses the terminology of Rule 41(a) in referring to an order granting or denying a petition for mandamus, or the writ itself, as a "judgment."[23]

A court of appeals is free to dispense with the automatic 21-day deferral of issuance of the mandate, or the automatic stay pending disposition of a petition for rehearing, *but it must so state in an order.* Rule 41(a), FED. R. APP. P. ("unless the time is shortened or enlarged by order"). Thus, the rule is flexible and can

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[22] The familiar characterization of mandamus as an extraordinary remedy does not alter the fact that it is a means to obtain appellate review. *Ex parte Peru*, 318 U.S. 578, 585 n.4 (1943); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) ("To enable this court then to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the court] to exercise appellate jurisdiction"). *See generally* 9 MOORE'S FEDERAL PRACTICE ¶ 110.26 ("[A]s the courts of appeals have by statute only an appellate jurisdiction § 1651 does not confer upon them any original jurisdiction." "If Congress has clearly evinced a statutory policy against appellate review of a particular type of interlocutory order, . . . then the orders are not reviewable by prerogative writ.").

[23] *E.g., Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 667 (1978) ("The judgment of the Court of Appeals is therefore *Reversed*"); *Will v. United States*, 389 U.S. 90, 107 (1967) (refers to a writ issued by the Seventh Circuit as "the judgment below"); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 260 (1957) (affirming a "judgment").

accommodate a need for expedited implementation of a judgment, where appropriate. No such order issued below.[24]

A practice to issue all mandates forthwith is invalid because it is inconsistent with Rule 41, a rule promulgated by this Court. 28 U.S.C. § 2071. SA-1. *See also* FED. R. APP. P. 47 (authorizing courts of appeals to make only those local rules "not inconsistent with these rules"). SA-4. In addition, and regardless of its substantive appropriateness, a practice to issue immediately all mandates in proceedings for extraordinary writs would be invalid because of its secret nature. "The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, *shall be published.*" 28 U.S.C. § 2077 (emphasis added), SA-1.[25]

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[24] The District Court has suggested that the clerk's certification of the June 19 Order could be construed as a separate order to shorten the time for issuance of a mandate under Rule 41(a). APP. C-3. But an "order," as the term is used in Rule 41, requires action by the Court itself, unless properly delegated to the clerk. Delegation of the substantive authority to implement judgments and foreclose appeals would be improper. In any event, this authority has not been delegated to the clerk. Rules of the United States Court of Appeals for the Ninth Circuit, Rule 22 (SA-6). An "order" also requires notice to the parties. FED. R. APP. P. 45(c) requires that the clerk, "immediately upon the entry of an order or judgment," "shall serve a notice of entry by mail upon each party to the proceeding. . . ." SA-4. Defendant-petitioners seek relief from this Court precisely, because the mandate issued on a secret timetable, without notice, while petitioners relied on the plain language of Rule 41(a) in concluding that issuance had been stayed by the timely filing of a petition for rehearing.

[25] The Ninth Circuit issued mandates in advance of the time specified by Rule 41(a) in the other two appeal dockets initiated by Dow Jones, pursuant to 28 U.S.C. §§ 1291 and 1292(b), but dismissed for lack of jurisdiction. APP. D and APP. E. Certified copies were lodged in the District Court on June 21, 1984 (APP. C-9, C-10), even though no order shortening the time for issuance of the mandate had been made in either matter. Defendants-

V. THE COURT OF APPEALS EXCEEDED ITS JURISDICTION IN VACATING THE DISTRICT COURT'S DISCRETIONARY DECISION TO STAY DISCLOSURE PENDING APPEAL

A. The Standards For Issuance Of A Writ Were Not Met

In issuing a writ to vacate a stay pending appeal, the Court of Appeals acted contrary to well-settled principles governing issuance of extraordinary writs. A writ of mandamus is a "drastic remedy" which must be reserved for the "rare," "exceptional" and "extraordinary" case. *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). "[T]he party seeking mandamus has 'the burden of showing that its right to issuance of the writ is "clear and indisputable" '." *Will v. United States*, 389 U.S. at 96 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)).

Entry of a stay pending appeal rests with the sound discretion of the District Court.[26] Because the District Court acted within its discretion, mandamus, which is traditionally used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction," *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978), could not properly issue. The entry of a stay pending appeal could rarely, if ever, amount to the "judicial 'usurpation of power' " that must be present to justify this extraordinary remedy. *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). "Where a

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petitioners do not know whether this was an isolated occurrence or whether it reflects a practice inconsistent with Rule 41(a) that extends beyond proceedings for extraordinary writs.

[26] *E.g., Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922); *Becker v. United States*, 451 U.S. 1306, 1312 (1981) (Rehnquist, J., in chambers) ("usual discretion" of district court to grant a stay pending appeal); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 193 (9th Cir. 1977).

matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable,' " and mandamus is, therefore, improper. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978)).

Where there is nothing to suggest that the District Court abused its discretion in entering the stay (see Part C below), the Court of Appeals exceeded its authority in substituting its judgment for the lower court's. "[The] office [of mandamus] is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

The Court of Appeals' use of the mandamus power to vacate the stay pending appeal was further inappropriate where the petitioner had alternate means to attain the relief that it sought. The usual procedure for review of a stay pending appeal is a motion to vacate filed in the merits appeal docket.[27] This recourse would have sensibly coordinated Dow Jones' concern for delay of access with the question whether any access was lawful. Dow Jones' concern for delay could also have been addressed by pursuing expedited treatment of the appeal of the disclosure ruling.[28] Finally, Dow Jones could have

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[27] 9 MOORE'S FEDERAL PRACTICE ¶ 110.26 n.1; *e.g.*, *United States v. South Bend Community School Corp.*, 692 F.2d 623, 627 (7th Cir. 1982); *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 210 n.3 (D.C. Cir. 1980); *Katz v. King*, 627 F.2d 568, 573 (1st Cir. 1980); *United States v. First National Bank*, 619 F.2d 774 (8th Cir. 1980); *In re Letters Rogatory to the Tokyo District*, 539 F.2d 1216, 1217-18 (9th Cir. 1976). *See* APP. C-6 n.6. Of course, to the extent Dow Jones did not oppose the stay below, it would first have to submit its position to the District Court or show that such action is impracticable. FED. R. APP. P. 8(a).

[28] *Cf. McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982).

opposed the stay in the District Court, testing its arguments against the stay before the court best suited to balance the equities arising from the particular facts and circumstances.[29]

Stays pending appeal are routinely entered in circumstances such as are present here.[30] The power of mandamus is available only as "necessary or appropriate in aid of [courts'] jurisdictions." 28 U.S.C. § 1651(a). Vacating the stay below could not have aided appellate jurisdiction over any matter, but has jeopardized jurisdiction over the appeal of important issues affecting substantial rights.

B. The Petition For Rehearing Should Have Been Granted Because, By Acting *Ex Parte*, The Court Of Appeals Necessarily Overlooked Significant Points Of Fact And Law

While petitions for rehearing often represent a losing party's last gasp, that is not the case here. Defendants prevailed on the stay issue in the District Court, after extensive briefing and against opposition by plaintiffs other than Dow Jones, and have yet to be heard by the Court of Appeals. By relying solely on Dow Jones' one-

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[29] *See Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm'n*, 260 U.S. 212, 219 (1922) ("[T]he court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits and, therefore, is familiar with the record."); *Krause v. Rhodes*, 434 U.S. 1335 (Stewart, J., in chambers) (declining to rule on stay application before same is ruled upon by courts below). Dow Jones' failure to oppose the stay in the District Court should have been a complete impediment to obtaining extraordinary relief from the Court of Appeals. *Cf.* FED. R. APP. P. 8(a); Supreme Court Rule 44.4.

[30] *E.g.*, *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1307 n.8 (7th Cir. 1984); *Providence Journal Co. v. F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979); *Antonelli v. F.B.I.*, 553 F. Supp. 19, 25 (N.D. Ill. 1982). *See also Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 460 (10th Cir. 1980); *cf. United States v. Dorfman*, 690 F.2d 1230, 1235 (7th Cir. 1982).

sided presentation of the facts and circumstances surrounding the stay pending appeal, the strict standards for rehearing are met because, inevitably, "the court has overlooked or misapprehended" significant points of fact and law. FED. R. APP. P. 40(a).

It is not even certain that the significance of the stay to preserving jurisdiction over the appeal in No. 84-5878 was meaningfully disclosed to the panel issuing the *ex parte* writ. Dow Jones' petition did not advise the panel that the disclosure ruling was controversial, or that the ruling raised matters of first impression in the Ninth Circuit.

The petition was somewhat misleading in construing the disclosure decision as finding a right of "contemporaneous" access, which Dow Jones interprets as a right of immediate access. Only with this gloss could Dow Jones argue that a stay could not be reconciled with the newly-found access right. But the word "contemporaneous" has no meaning except in relation to some event. The District Court's ruling reveals that the appropriate event is "the judge's decision" on the merits. APP. B-18.[31] Since there had not been any dispositive decision involving the sealed material, any right of access contemporaneous to judicial action was not threatened by a stay.[32]

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[31] If the purpose of the common law right of access is to check judicial abuses . . . then that right should only extend to materials *upon which a judicial decision is based.*

Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980) (citations omitted; emphasis added). *Accord, e.g., Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866, 901 (E.D. Pa. 1981) ("the basis of a dispositive ruling"); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-11 (7th Cir. 1984); *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[32] There is an established line of cases using the phrases "contemporaneous review" or "contemporaneous access," but each finds that access should be contemporaneous with a trial or other dispositive hearing in open court. The seminal case is *In re Oliver*, 333 U.S. 257, 270 (1948) ("[t]he knowledge that every criminal trial is

Moreover, Dow Jones did not inform the panel issuing the writ that it had not opposed the stay in the District Court despite full opportunity to do so. This is an obstacle to obtaining jurisdiction over a stay that must, therefore, have been overlooked by the Court of Appeals. See note 29 above. The newspaper also created a false sense of urgency in the Court of Appeals by incorrectly presenting the lower court ruling as implicating important First Amendment rights[33] and by erroneously contending that one of the MDL 150 cases was close to resolution either on summary judgment or by settlement.

These material omissions in the record before the Court of Appeals merely particularize the inevitable consequences of *ex parte* adjudication. Defendants' petition for rehearing of the June 19 Order was uniquely meritorious and should at least have been considered below. Only action by this Court can revive rights lost by defendants and prevent further irreparable harm.

C. The District Court Did Not Abuse Its Discretion In Entering A Stay To Preserve The Status Quo Pending Appeal

The District Court's discretion was circumscribed only by the requirement that a stay represent a balance of the equities, in which no one factor determines the outcome.[34]

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subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power"). *E.g., In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1305 n.4, 1308-11 (7th Cir. 1984) ("contemporaneous access" to evidentiary hearings in open court).

[33] The District Court Opinion explicitly declined to find any First Amendment basis for its decision to expand public access rights, relying solely on common law precedent. APP. B-15-B-16. Dow Jones disagrees with such finding.

[34] The balance of equities involves four factors: "(1) the likelihood that defendants will ultimately prevail on the merits of their appeal; (2) the extent to which defendant[s] would be irreparably harmed by denial of the stay; (3) the potential harm to plaintiffs if the stay is issued; [and] (4) the public interest." *Turner v. Woods*, 559 F. Supp. 603, 619 (N.D. Cal. 1982), *aff'd*, 707 F.2d

1. *The Balance Of Interests Strongly Favors Maintenance Of The Stay Pending Appeal*

The balance of the varying interests of defendants, plaintiffs, Dow Jones and the public favored entry of the stay in order to prevent irreparable harm to the defendants. Defendant-petitioners are threatened with disclosure to the public, including their business competitors, of confidential, private files that they have been compelled to disclose to adverse parties under the liberal federal discovery rules. Loss of confidentiality from such disclosure cannot be undone or recompensed. As shown below, petitioners' likelihood of success in overturning the District Court's disclosure order is strong, and has been further strengthened by this Court's decision in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984). Thus, there is good reason to view this forced disclosure as unauthorized by law. Regardless of the merits of the disclosure order, petitioners are threatened with very serious irreparable harm in the form of loss of appellate rights.

> [T]he Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered . . . confidentiality will be lost for all time. The status quo could never be restored.

Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979).[35]

1109 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 1412 (1984); *accord Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

[35] *Accord Antonelli v. F.B.I.*, 553 F. Supp. 19, 25 (N.D. Ill. 1982); *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979). The public interest in vigilant protection of rights, especially rights of privacy and appellate due process having constitutional dimension, is

Harm, if any, to plaintiffs and Dow Jones from a stay is minimal and is not properly viewed as irreparable. Plaintiffs, of course, have possession of the sealed items as litigants. The harm to the newspaper is no more than delay of access to materials that have not yet been subject to dispositive judicial action, and even this harm arises only by assuming that the newspaper will prevail on the merits of the disclosure appeal. Indeed, the delay complained of by Dow Jones is a necessary incident of due process and thus, by definition, cannot properly be considered as irreparable harm. *E.g., In re San Juan Star*, 662 F.2d 108, 112 (1st Cir. 1981) ("[W]e reiterate our oft-stated view that potential burdens of litigation or relitigation cannot alone constitute the requisite [irreparable] harm.").[36] The Court of Appeals should not have considered the time incident to litigation—including appeal—to constitute irreparable harm to Dow Jones.

2. *Defendants Are Likely To Succeed On The Merits Of The Disclosure Appeal*

The District Court's April 12 ruling holds that pretrial civil discovery is presumptively open to the public

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threatened by the elimination of the stay. A strong public interest in the umbrella protective order device as an aid to efficient resolution of disputes is threatened by the District Court Opinion and, therefore, by elimination of the stay. *See* authorities cited in note 38 below. Maintenance of the stay will ensure that these interests will be protected through authoritative resolution on appeal.

[36] *See also, e.g., Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979):

> Failure to grant a stay will entirely destroy appellants' rights to secure meaningful review. On the other hand, the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure—assuming the Journal prevails—by whatever period of time may be required for us to hear and decide the appeals. Weighing this latter hardship against the total and immediate divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.

and, therefore, a valid protective order issued under Rule 26(c), FED. R. CIV. P., is ineffective once protected material is filed at the courthouse. Public access to such filed material is required by the common law principle of public trials, according to the decision below, even though the material in question has not been and may never be subject to dispositive action by a court. This decision was vulnerable at the time it was entered for several reasons. First, there are many lower court cases whose analysis indicates the contrary view that public access does not extend to unadjudicated civil pretrial material.[37] Second, since the undisputed purpose of the public access right is to allow monitoring of judicial performance, there is no logic in extending public access to material that has not been and may never be the basis of any dispositive judicial action. Third, the ruling below effectively nullifies protective orders issued under Rule 26(c), FED. R. CIV. P., especially umbrella orders long considered essential to managing complex proceedings such as MDL 150. This third point is in conflict with substantial but indirect authority,[38] and itself raises ques-

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[37] The District Court acknowledged three such decisions. *Tavoulareas v. The Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984), *vacated and reh'g en banc granted*, (March 15, 1984), *remanded*, (June 25, 1984); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866 (E.D. Pa. 1981); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980). Among other cases reasoning contrary to the District Court and presented below are *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984); *In re "Agent Orange" Product Liability Litigation*, 98 F.R.D. 539 (E.D.N.Y. 1983); *Cianci v. New Times Publishing Co.*, 88 F.R.D. 562 (S.D.N.Y. 1980); *Times Newspapers Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189 (C.D. Cal. 1974).

[38] *E.g.*, Rule 1, FED. R. CIV. P. (requiring construction of Rule 26(c) so as "to secure the just, speedy, and inexpensive determination of every action"); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); *Wilk v. American Medical Ass'n*, 635

tions important to the administration of justice that should be resolved, if not by this Court, by the Ninth Circuit.

The District Court described its ruling as raising "important" issues of first impression in this Circuit, (APP. B-13), and as a "controversial" ruling that should be "authoritatively resolved" on appeal to the Ninth Circuit.[39] For a stay pending appeal, it is enough to show that "serious legal questions" are presented and that defendants' appeal has "potential merit," *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979), or that the area of the law is unsettled or that parties in similar situations have prevailed. *E.g., Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 537 F. Supp. 1036, 1037 (E.D. Pa. 1982). Under this standard, defendants' appeal is meritorious.

Defendants' showing has since been made stronger. This Court recently spoke in the area of pretrial disclosure in civil cases and appeared to take an approach different from the District Court. *Seattle Times v. Rhinehart*, 104 S. Ct. 2199 (1984). *Seattle Times* holds that the press does not have a presumptive right to disclose information obtained through civil discovery, even when a newspaper is in legitimate possession of protected material by virtue of being a party to the lawsuit.

F.2d 1295 (7th Cir. 1980); *Martindell v. ITT*, 594 F.2d 291 (2d Cir. 1979); *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (E.D. Pa. 1981); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 Fed. R. Serv. 2d 1251 (N.D Cal. 1974); *see Marcus, Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983) (cited with approval in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2207 (1984)).

[39] APP. B-25. Dow Jones hailed the District Court's decision in its newspaper as breaking new ground and representing a dramatic expansion of newsgathering sources. The Wall Street Journal, Wed., Feb. 15, 1984, p. 10 (headlined "Oil Firms' Pre-Trial Documents Are Open To Public, Judge Rules").

In prior related decisions, addressing the scope of access to criminal trials, the necessary guidelines for identifying information subject to presumptive public access rights had been defined as, first, information traditionally open to the public and, second, information specifically required to monitor the judicial system.[40] No rights of access to satisfy curiosity about the subject matter of the lawsuit or the litigants should be protected by the Constitution or historical tradition. Applying the first part of this analysis to civil pretrial material, the unanimous Court in *Seattle Times* concluded that "discovered, but not yet admitted, information [is not] a traditionally public source of information." 104 S. Ct. at 2208. The decision appeared to draw the line of access at trial or, perhaps, evidentiary ruling, but did not address the finer distinction at issue below.[41]

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[40] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

> First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. *Cf. In re Winship*, 397 U.S. 358, 361-62 (1970). Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience.
>
> Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

448 U.S. at 589 (Brennan and Marshall, J.J. concurring). *Accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982).

[41] The question answered in the negative was "whether parties to civil litigation have a First Amendment right to disseminate, *in advance of trial*, information gained through the pretrial discovery process." 104 S. Ct. at 2202 (emphasis added). The protective order upheld in *Seattle Times* prohibited dissemination of discovered information "before trial." *Id.* at 2208. Prior to this point, First Amendment rights were deemed minimal and, therefore, easily outweighed by separate government interests, such as in protective orders or efficient and fair adjudication.

[Footnote continued on page 30]

Had the decision in *Seattle Times* been available to the District Court, we believe it would have reached a different result. Where defendants can make such a strong showing of likelihood of success on that appeal, with the requisite irreparable harm, the stay pending appeal should not have been disturbed. This Court's process should be available to reinstate that stay and preserve appellate jurisdiction over the important questions raised in the appeal of the District Court's disclosure ruling, as well as to resolve the equally significant questions of appellate procedure raised herein.

CONCLUSION

The unique circumstances of an *ex parte* final disposition of a petition for mandamus have made the Court of Appeals' final order of June 19, 1984, extraordinarily frail. The consequences of this *ex parte* disposition have been made irrevocable by persistent violations of the Federal Rules of Appellate Procedure. These are extraordinary circumstances that warrant exercise of the specific powers conferred on this Court by the All Writs Act. For the reasons set forth above, and as "necessary and appropriate in aid of" this Court's appellate jurisdiction, this petition for a writ of mandamus should be granted and a writ, as prayed for, issued forthwith.

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[41] [Continued]

The issue below distinguishes between items that are the basis of a judicial decision and items filed at the courthouse in contemplation of possible decision.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-7262

DC# MDL-150 WPG
Central California

DOW JONES AND COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

STATE OF ARIZONA; STATE OF CALIFORNIA, *et al.*,
Real Parties in Interest.

ORDER

[Filed June 19, 1984]

Before: SCHROEDER, ALARCON and FERGUSON, Circuit Judges

The petition for a writ of mandamus is granted. The stay pending appeal of the disclosure procedure ordered by the district court is vacated.

MoCal 5/28/84

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MDL-150 WPG

ALL CASES

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

ORDER

[Filed April 6, 1984]

Having considered (a) motions by the plaintiff-intervenor Dow Jones Company, Inc. for access to material sealed pursuant to a protective order entered by this court, (b) a motion by the State Case plaintiffs pursuant to Paragraph 3 of the MDL-150 protective order to declassify certain documents, (c) memoranda supporting and opposing said motions, and (d) oral argument of all interested parties, and having set forth the applicable law in the court's MEMORANDUM OF DECISION entered February 10, 1984, which is incorporated herein by reference,

IT IS HEREBY ORDERED:

(1) Pursuant to the common law right to access and the MDL-150 protective order the following documents are subject to declassification: (a) Plaintiffs' pretrial briefs, including Florida's Supplement to the State

Cases Plaintiffs' Initial Pretrial Brief, and documents and exhibits attached to and cited therein; (b all summary judgment material filed under seal, including motions for summary judgment, opposing and supporting memoranda and documents cited in or attached thereto; and (c) material related to motions for judgment on the pleadings filed under seal, including such motions, opposing and supporting memoranda, and documents cited in and attached thereto. These documents shall be unsealed subject to the procedures set forth in paragraphs (3) and (4) below.

(2) The court is informed that the plaintiffs in the State Cases have served upon defendants' liaison counsel one copied set of the documentary exhibits to Plaintiffs' Initial Pretrial Statement that were filed with the court on November 3, 1983. Defendants shall promptly reimburse plaintiffs for one half the cost of reproducing such documents.

(3) Within sixty days following the entry of this Order, defendants shall identify and submit to the court and serve on plaintiffs those documents identified in paragraph (1) that they contend are trade secrets or presently so commercially sensitive that their disclosure would cause substantial harm to defendants' competitive positions. When submitting the documents, defendants may also submit memoranda explaining why categories of material ought to remain sealed and identifying which documents fall into each category. The defendants shall serve any such memoranda upon liaison counsel in both cases. Documents identified in paragraph (1) but not submitted for further protection pursuant to this paragraph or paragraph (4) shall be declassified and unsealed seventy days following the date of entry of this Order.

(4) Prior to submissions to be made pursuant to paragraph (3), each party shall review the materials identified in paragraph (1) that it submitted to the court

and deliver to any non-party a copy of any documents cited therein or attached thereto that contain information produced by such non-party covered by the MDL-150 protective order. Such non-party may then take part in the briefing procedure described in paragraph (3) by moving to intervene for that limited purpose. Upon intervention, a third party seeking to retain the confidentiality of documents shall agree to pay to the party incurring such costs a reasonably proportionate share of the expenses entailed in the review, copying and delivery of documents to the third party.

(5) With respect to any document called to the attention of the court pursuant to paragraphs (3) and (4) hereof, the court will take such action as it deems appropriate regarding declassification, depending upon the number of documents involved and the showings made.

(6) This Order is hereby stayed for thirty days, and thereafter pending appellate review if defendants shall have joined in a request to the Court of Appeals for an expedited review.

DATED: April 6, 1984

/s/ William P. Gray
WILLIAM P. GRAY
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. MDL-150-WPG

ALL CASES

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION

[Filed February 9, 1984]

I. INTRODUCTION

The present controversy in these consolidated cases pits the public interest in open court proceedings against the private interest in the confidentiality of allegedly commercially sensitive information made available to opposing litigants by court process. This tension is not uncommon in complex civil litigation. At the center of the conflict are umbrella protective orders frequently entered to facilitate discovery in large cases. *See, e.g., In re Agent Orange Product Liability Litigation*, 98 F.R.D. 539 (E.D. N.Y. 1983); *Zenith Radio Corporation v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866 (E.D. Pa. 1981).

The protective order in these cases was initially entered in May 1974 by Judge Clarie of the District of Connecticut. I adopted it as part of Pretrial Order ("P.T.O.") No. 2 in January 1977, four months after the consolidation of the several cases by the Judicial

Panel on Multidistrict Litigation.[1] The consolidated cases, known as MDL-150, are complex civil antitrust actions involving the oil industry. The cases fall into two distinct classes, and P.T.O. No. 2 applies to both. One group, the "*State*" cases, is comprised of actions brought by the attorneys-general of several states against most of the major oil companies.[2] The plaintiffs charge a nationwide, indeed, a worldwide, conspiracy to create artificial shortages and to raise the prices of retail petroleum products, the alleged effects of which are commonly known as the "oil crisis" of the mid-1970's. The plaintiffs in the other set of cases, the State of California and the City of Long Beach, are owners of oil fields and sell their crude oil to the five defendant-integrated oil companies.[3] In these actions, dubbed "*Long Beach*," the plaintiffs allege a conspiracy to depress the prices of crude oil in Long Beach over a period stretching from the early 1960's to the late 1970's.

Presently, in both the *State* and *Long Beach* cases, there are numerous pending motions by defendants, and a few by plaintiffs, for partial and entire summary judgment on the pleadings. Some of these motions were filed as early as 1979, while the briefing on other summary judgment motions is not yet complete. In June 1982, the *Long Beach* plaintiffs filed their Statement of the Case, and in January 1983, the *State* plaintiffs filed their Initial Pretrial Brief.

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[1] The consolidation order is reported as In re Petroleum Products Antitrust Litigation, 419 F. Supp. 712 (J.P.M.L. 1976).

[2] Initially, the plaintiff states were: Florida, Connecticut, Kansas, California, Arizona, Oregon and Washington. Florida and Connecticut filed their actions in 1973. The rest came in 1974-1977. Kansas and Connecticut are no longer parties. The defendant corporations now are: Mobil Oil, Standard Oil of Indiana, Atlantic Richfield, Gulf, Standard Oil of California, Texaco, Phillips Petroleum, Union Oil, Exxon and Shell.

[3] The companies are: Texaco, Exxon, Union, Mobil, Shell, Atlantic Richfield and Standard Oil of California.

In April 1982, this court granted the motion of Dow Jones, Inc., publisher of the *Wall Street Journal*, to intervene for the purpose of seeking modification of the protective order in both the *Long Beach* and the *State* cases. I declined, however, to rule on Dow Jones' motion for declassification at that time and have so declined on four occasions since then, each time inviting the intervenor to renew its motion at the time of the formal hearings on the motions for summary judgment in the *Long Beach* case. More recently, California, Arizona, Florida, Oregon and Washington have moved for an order of declassification in the *State* cases. The *State* plaintiffs seek declassification[4] of all summary judgment motions and memoranda in support and in opposition (including attached exhibits and affidavits) and the plaintiffs' Initial Pretrial Brief (including Supplements and documents cited therein) filed under seal in the *State* cases. Intervenor Dow Jones asks that I lift the seal on: all summary judgment motions, memoranda in support and in opposition in both the *State* and *Long Beach* cases (including declarations and exhibits attached thereto or referenced therein); the plaintiffs' Pretrial Statement in the *Long Beach* case (including attached and referenced items, as above); and the plaintiffs' Initial Pretrial Brief in the *State* cases (with all attached and referenced exhibits and declarations). Both movants contend that the public has a constitutional and common law right of access to those materials and that most of the information under seal is not worthy of protection under the terms of the protective order. The defendants, of course, argue the opposite.

Dow Jones' most recent "continued" motion and the *State* plaintiffs' motions were heard together on November

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[4] The plaintiffs first served a "Notice of Objection" on ten defendants in January 1983, wherein plaintiffs made the request now addressed to the court. The protective order prescribes the procedure for objecting to a filing made under seal. *See* section II, below.

17, 1983. The central question before this court—to what extent may a previously imposed protective order be lifted in order to give the public access to civil pretrial materials—has not been decided in this circuit. As is set forth below, I conclude that declassification of most of the subject documents is appropriate at this time.

II. THE PROTECTIVE ORDER IN MDL-150

On May 21, 1974, at the inception of the two cases that grew into MDL-150, Judge Clarie granted an oil company defendant's motion for a protective order under Fed. R. Civ. P. 26(c)(7) "to prevent the imminent public exposure of . . . confidential trade secrets and information of commercial significance to competitors." This is the order that governs today. Under it, any portions of documents, depositions, or interrogatory answers may be designated "Confidential Material" by the party providing the information or by a party to whom the information relates. Confidential information may be used only for purposes of the instant litigation, and upon the termination of the litigation all such material and any copies must be returned to the party that produced it. The order provides for contemporaneous objections to the designation of something as "Confidential." If, after receiving a notice of objection, the designating party does not agree to declassification, the objecting party may move the court for an order of declassification. A primary by-product, if not a purpose, of the order was to facilitate discovery by avoiding document-by-document battles over protection. Thus, the order contemplates that the judge infrequently will be called upon to make individual Rule 26(c)(7) determinations. Much discretion lies with the litigants regarding the quantity and nature of material filed under seal or designated "Confidential" but not filed.

It is impossible to tell what showing was made or what standard Judge Clarie applied when he granted the

motion for a protective order in 1974. In 1977, when I incorporated his order into P.T.O. No. 2, the plaintiff states apparently agreed to closure, and there was no controversy.

The discovery disputes in MDL-150 up to now have had little to do with the protective order or with the propriety of filing materials under seal. Both plaintiffs and defendants have made "Confidential" designations, although those of the latter are much more numerous. The majority of docket filings over seven years have not been sealed. However, in recent years, as the cases have progressed into the summary judgment phase, the parties, and particularly the defendants, have filed many legal memoranda—as opposed to the raw fruits of discovery—under seal. Certainly, some of these summary judgment papers incorporate business data as well as legal arguments, but as the summary judgment motions have not yet been decided, this court still is not ready to determine the extent to which that business information is innocuous, inculpatory or commercially sensitive.

III. INTERESTS IN ACCESS

A. *The General Policy of Openness*

American courts long have recognized a general right to inspect and copy public records, including judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 & nn. 7, 8 (1978).[5] Thus, the Ninth Circuit has held that a first amendment right of access

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[5] The Federal Rules of Civil Procedure contemplate that documents filed with the court be open generally to the public. Rule 5(d) provides that all papers served upon a party after the complaint must be filed with the court unless the court otherwise orders. Clerks are instructed to make any court record available to anyone that asks for it, unless the record is filed under seal or disclosure is prohibited by statute. Administrative Office of the United States Courts, 4A GUIDE TO JUDICIAL POLICIES AND PROCEDURES § 201.3 (1980).

attaches to pretrial documents in criminal cases. *Associated Press v. United States District Court*, 705 F.2d 1143 (1983) (reversing trial court order sealing all documents in a criminal case). The law is less clear with respect to civil pretrial materials. *Compare Tavoulareas v. The Washington Post*, No. 80-3032 (D.C. Cir. January 6, 1984), and *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866 (E.D. Pa. 1981), *with Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983). As is discussed below, these decisions are conflicting with regard to the scope of the right in civil cases and whether it is based upon the common law or derives only from the Federal Rules of Civil Procedure.

Whether stemming from the Federal Rules, the common law or the Constitution, the general presumption of open court records and proceedings would seem to serve the same purpose: "assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (plurality opinion). In concurring, Justice Brennan wrote, "public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'" *Id.* at 592 (quoting *In re Oliver*, 333 U.S. 257, 270 (1943)). The interest in access to court proceedings in general may be asserted more forcefully when the litigation involves matters of significant public concern.

B. *The Public Interest in This Litigation*

The cases before this court, both *State* and *Long Beach*, present many issues of fact and law. The *State* plaintiffs allege a conspiracy among some of the world's largest enterprises to raise and stabilize the retail prices of gasoline beginning in 1958 and continuing to 1981. One of the charges is that defendants' collusion on the

international front was a substantial cause of the shortage experienced in this country around the time of the Arab oil embargo in 1973 and later. The *State* plaintiffs also allege that the major integrated oil companies conspired on the domestic front to drive independent gasoline retailers out of business. If these charges prove true, the defendants' illegal conduct has affected the lives of all Americans. If these allegations are false, public officials have wasted many millions of dollars of taxpayers' money in prosecuting fruitless cases for nearly a decade.

While less momentous, the conspiracy alleged by the *Long Beach* plaintiffs would be of significant concern, if proved, to the citizens of California. If the charges prove true, state and local governments have been cheated out of many millions of dollars of revenue owed for the exploitation of public resources. If the defendants' counterclaims succeed, public officials will have been shown to have abused their discretion in the management of public resources to the detriment of the taxpayers as well as the defendants. Certainly, the public has an interest in learning of the factual and legal contentions in both cases.

It is possible that neither case will go to trial, and thus it is possible that some of the most damning of plaintiffs' charges never will be tested by the evidence. At the summary judgment stage of the litigation, the public interest in access is every bit as strong as it would be at trial.

The rationale for public access is especially apropos, it seems, when the plaintiffs' lawyers are public officials. In MDL-150, the plaintiffs are represented by the attorneys-general of Arizona, California, Florida, Oregon and Washington, as well as by private firms selected by government officials. In light of the cost of the litigation thus far, and considering the fact that the cases

have been in court for nearly ten years, the performance of the counsel as well as of the judge ought to be subject to public scrutiny. While the courtroom door has always been open, much of the information needed to understand the proceedings lies in documents filed under seal.

C. *Nature of the Materials Now Under Seal*

It is true, as the defendants point out, that most of the docket filings in MDL-150 have not been designated "Confidential." However, it also is true that what is sealed constitutes, overall, the most significant aspects of the litigation: how the plaintiffs intend to prove their cases and why they may or may not be able to show actionable wrongdoing. Most all of the memoranda and exhibits connected with the pending motions for summary judgment, as well as the plaintiffs' pretrial briefs, are sealed.

Some of the briefs contain the proponents' interpretations of historical events in the oil industry, of meetings and conversations that are alleged to have involved price fixing, of the effects of federal regulations on the prices and supply of petroleum products, and of the effects of recent developments in antitrust law on the viability of plaintiffs' damage claims. Certainly, public disclosure of these types of arguments would not adversely affect defendants' trade secret interests, competitive positions, or privacy rights. On the other hand, some of the briefs and exhibits discuss defendants' refinery capacities, the inter-refinery values of crude oil and information concerning defendants' marketing plans in the 1970's. It may be, as Dow Jones and the plaintiffs contend, that most of the data in this latter group are so stale as to have little, if any, commercial significance and that even when current, defendants shared this data with trade associations (such as the American Petroleum Institute) and the trade press (such as *Platt's Oilgram*). Defendants argue that an astute observer could derive the companies' cur-

rent strengths, weaknesses or strategies from even old information. Yet, defendants do not specify which documents remain sensitive irrespective of age.

At this juncture, it is clear that some of the sealed information never would have qualified for protection under the terms of P.T.O. No. 2 or Rule 26(c)(7). It is quite likely that most of the other sealed documents have lost their character as commercially sensitive due to the passage of time.

D. *Equipoise*

Defendants urged at one time that declassification should occur only when the materials are in "equipoise," that is, that the seal should be lifted only when a balanced picture of the controversies would be disclosed. There is some doubt in my mind as to whether "equipoise" is a proper consideration for a court in deciding a motion to declassify. We are not concerned here with any danger of prejudicial pretrial publicity, for trial does not loom on the horizon. Nor is it suggested that defendants would suffer the kind of "embarrassment" against which Fed. R. Civ. P. 26(c) may protect a party. It is not the duty of federal courts to accommodate the public relations interests of litigants.[6] In any event, it seems that a rough balance has been attained. Defendants have filed approximately fifty motions for summary judgment,

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[6] In Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983), the opinion noted:

> . . . [T]he natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public . . . cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.

including extensive memoranda in support and exhibits thereto. Plaintiffs have filed multi-volume initial pretrial briefs, attaching a multitude of exhibits, as well as responses to the defendants' motions. Thus, both sides have "fired their best shots" in stating their positions. Therefore, declassification need not be delayed on the ground that "equipoise" is lacking.

IV. BASIS FOR ORDERING DECLASSIFICATION

The preceding section sets forth the principle that adjudication is generally to be conducted in public and the primary reasons why the instant litigation should be no exception. As has been noted, the question of when the public access interest may outweigh the interest in confidentiality of pretrial documents in civil cases is undecided in this circuit. The following discussion illustrates that the basis of the access right, and hence its strength, may vary depending upon the stage of the proceedings and whether they are criminal or civil.

A. *The Federal Rules and Judicial Discretion*

Rule 26(c)(7) provides that upon a showing of good cause, a court may order that trade secrets, confidential research or other commercial information produced during discovery be protected from public disclosure.[7] The result of such an order is to place court records under seal.

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[7] While the Rule refers to protection from "annoyance, embarrassment, oppression or undue burden or expense," it has been held that Rule 26(c)(7) protects against competitive disadvantages as well. *E.g.* Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Haw. 1975); Maritone Cinema Serv. Corp. v. Movies En Route, Inc., 60 F.R.D. 587 (S.D. N.Y. 1973). The good cause requirement is met by a showing that disclosure will work a clearly defined, specific and serious injury. *See, e.g.*, United States v. Hooker Chem. & Plastics Corp., 90 F.R.D. 421 (W.D. N.Y. 1981); Essex Wire Co. v. Eastern Elec. Sales Co., 48 F.R.D. 308 (E.D. Pa. 1980).

A trial judge has discretion in the granting of a protective order. *See generally* 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2036 (1970 & Supp. 1983). This rule reflects the principle that "every court has supervisory power over its own records and files." *Warner Communications, supra*, 448 U.S. at 598. Hence, the matter of whether a protective order, once issued, should be lifted may be "left to the sound discretion of the trial court." *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir. 1982).

In granting an umbrella protective order, the judge delegates to the litigants significant discretion to decide what shall be sealed. This is, in fact, contemplated by such an order: "If a judge, magistrate, or special master had to rule upon countless invocations of Rule 26 (c) (7), the progress of complex cases would be severely impeded." *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866, 879 n.18 (E.D. Pa. 1981). A problem arises if it later appears that the parties have abused their authority to designate documents "Confidential" or that, for some other reason, some of the sealed information should not legitimately remain closed to the public.

In these circumstances, it would seem that a balancing must take place between the interests in access and the interests in confidentiality. The weight to be accorded each may vary depending upon what purposes the documents serve in litigation. For example, the District of Columbia Circuit recently held that as to filed documents that have never been submitted into evidence, read into the record or submitted in connection with a pretrial motion, the public access interest is relatively weak and is grounded only in the Federal Rules—it does not derive from either the first amendment or the common law. *Travoulareas v. The Washington Post*, No. 80-3032 slip op. at 12 (D.C. Cir. Jan. 6, 1984); *see id.* at 3 n.2. Thus, the interest in access to such materials can be out-

weighed by a less than strenuous showing that declassification would endanger privacy rights or trade secrets. *See id.* at 29-30. The public access interest in materials that do play a part in adjudication, such as the materials here at issue, is stronger: courts have found the interest to be based on the common law and, at least in criminal cases, on the first amendment.

B. *The First Amendment*

In arguing that the first amendment right of access should apply to civil as well as criminal proceedings, Dow Jones and the *State* plaintiffs urge this court to adopt the three-part balancing test set out in *Associated Press, supra*, 705 F.2d 1143, 1146 (9th Cir. 1983). If I were to do so, the documents at issue could not constitutionally remain sealed unless there appeared to be a substantial probability: (1) of irreparable damage to a defendant's right to a fair trial or other constitutionally protected interest; (2) that alternatives to confidentiality will not protect adequately that right; and (3) that sealing the documents will be effective in protecting against the perceived harm. *See id.*

The Supreme Court has not held that the Constitution provides a public right of access to civil proceedings, trials or documents.[8] Lower courts considering the ques-

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[8] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) held that the first amendment implicitly guarantees a public right to attend criminal trials. Justice Stewart stated that the first amendment "clearly gives the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599 (Stewart, J., concurring). In Press Enterprise Co. v. Superior Court, No. 82-556 (U.S. Jan. 18, 1984), the Court extended the first amendment right of access to voir dire proceedings in criminal cases. It has been noted that the policy considerations and history supporting a first amendment right of access to criminal proceedings apply as well in the civil context. *See* In re Iowa Freedom of Information Council, No. 83-1573, slip op. at 4 (8th Cir. Dec. 30, 1983); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178-79 (6th Cir. 1983).

tion of access to documents have thus far declined to find such a right based on the first amendment, in part due to the Court's *Warner Communications* decision. 435 U.S. 589 (1978). There, Warner sought to copy the Watergate tapes used as evidence in a criminal trial. Transcripts of the evidence had been made available in full to the press and the public, and the trial judge had allowed the media to listen to the tapes. The Supreme Court found that "[t]here is no question of a truncated flow of information to the public," *id.* at 609, and the Court rejected Warner's argument that the first amendment secured its right to copy, and disseminate copies of, the tapes. A "crucial fact" was that Warner's request for physical access would "require a court's cooperation in furthering [its] commercial plans." *Id.* at 602-03.

The *Travoulareas* court interpreted *Warner Communications* to hold that there is no constitutional right to copy and disseminate judicial records or evidence used at trial. Slip op. at 14. The *Zenith* court opined that *Warner Communications* held that the first amendment does not establish a right to inspect and copy materials and exhibits used in open court proceedings. 529 F. Supp. at 913. A more narrow reading of the Court's holding certainly can be imagined, and such a reading would be more consistent with the Ninth Circuit's decision in *Associated Press, supra.* Nevertheless, it seems more appropriate to base the decision granting the motions to declassify on common law, as opposed to constitutional, grounds.

C. *The Common Law*

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866 (E.D. Pa. 1981), a decision upon which the defendants here rely extensively, Judge Becker faced a similar challenge to an almost identical protective order. The *Zenith* opinion reviews the common law right of access to "judicial records"

and finds that the right attaches, presumptively, to: (1) materials filed with the court, unless filed under seal pursuant to court order; (2) transcripts of open court proceedings (and portions of documents read in open court, even if filed under seal); (3) material that is the subject of an evidentiary ruling (even if originally sealed); (4) material referred to at a hearing, to the extent that the reference is more specific than general; and (5) material filed under seal that has become the subject of a dispositive ruling and published opinion. *Id.* at 895-901. The rationale behind this roster is that courts have an obligation to explain their decisions and therefore to allow the public an opportunity to assess the correctness of those rulings. *See id.* at 901. *See also Tavoulareas, supra,* slip op. at 12. Thus, under the *Zenith* view, common law public access interests need not be considered when entering a Rule 26(c)(7) protective order because those interests simply do not attach until, essentially, the judge makes a ruling based upon the subject documents.

In contrast to the *Zenith* view of the common law is the recent decision in *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), vacating the district court's order sealing all documents filed by the Federal Trade Commission in an injunctive action brought by the tobacco company to prevent proposed agency action. In *Brown & Williamson,* the Sixth Circuit found a "strong common law presumption in favor of public access to court proceedings and records." *Id.* at 1179. The court relied primarily on *Richmond Newspapers, supra,* 448 U.S. 555 (1980), and explained that the policy considerations supporting a public right of access to criminal trials apply as well to civil trials and pretrial proceedings. Thus, the Sixth Circuit decided that a common law public access right attaches, presumptively, to all documents filed for the court's consideration in a civil case such that the district judge must

take such access interest into account in determining the propriety of closure. Unlike *Zenith*, in *Brown & Williamson*, the court apparently decided that documents need not have been the subject of a judicial decision for the presumptive access right to attach.

Since the motions for summary judgment in MDL-150 have not yet been decided, the significance of the difference between *Brown & Williamson* and *Zenith* is that under the former view of the common law, the presumptive public access right has already attached to the documents at issue here, while under the latter view it has not. Both decisions state that even after the access right has attached, countervailing interests may outweigh the presumption of access. *Brown & Williamson, supra*, 710 F.2d at 1179-80; *Zenith, supra*, 529 F. Supp. at 901-05. *See also Tavoulareas, supra*, slip op. at 15-27.

I am troubled by the *Zenith* classification of materials to which the common law access right attaches. If the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision, *see Zenith*, 529 F. Supp. at 897-901; *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980), documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision. Further, in determining which items are presumptively open, there seems to be no real justification for drawing a line between documents submitted to the court in connection with a motion *before* the judge decides the motion and the same documents *after* the decision. While it might be argued that the judge's familiarity with the content serves to screen scandalous, irrelevant or sensitive commercial information, the issue is at what point the presumptive access right attaches—not whether countervailing interests will overcome the presumptive right, and certainly not whether the information will be relevant at trial. Indeed, for the presumptive right to

be suspended or nonexistent until after the judge has ruled on a motion, would be to impair the important interest in contemporaneous review by the public of judicial performance. *See Richmond Newspapers, supra,* 448 U.S. at 592 (Brennan, J., concurring).

IV. APPLICATION OF THE COMMON LAW

Based on the principles discussed above, I find that a strong common law presumption of access has attached to all of the documents at issue.[9] The next step is to consider whether countervailing interests, such as the interest in maintaining the confidentiality of trade secrets and other sensitive commercial information of use to competitors, outweigh the access right as to any of the documents. The defendants, relying upon *Zenith, supra,* 529 F. Supp. at 875, 894, would have this court place on the movants the burden of showing that confidentiality interests do not overcome access interests. This I decline to do.

First, Dow Jones, an intervenor, can hardly be said to have "ratified" P.T.O. No. 2 or "waived" its right to

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[9] These presumptively open documents include the plaintiffs' pretrial briefs (and documents and exhibits cited therein) as well as the summary judgment materials. It should be noted that these pretrial briefs have been submitted, in part, for the court's consideration in ruling on the summary judgment motions. Plaintiffs' memoranda opposing summary judgment refer to information in, indeed to whole chapters of, their pretrial briefs. And, in the *State* cases, this court's "Order Amending Pretrial Order No. 6 And Providing for Form of Initial Pretrial Briefs," dated Dec. 2, 1982, contemplated that at least some of the defendants motions for summary judgment would be targeted at the allegations in the pretrial briefs. The public access right also has attached to Florida's Supplement to the plaintiffs' Initial Pretrial Brief (in the *State* cases) and all documents cited therein. Similarly, the plaintiffs' "Common Issues Brief" in the *Long Beach* case (including all cited materials) is presumptively open. And, of course, the memoranda exhibits and cited documents connected with the few motions for judgment on the pleadings are included in the presumptively open category.

seek declassification *en masse* by failing to bring contemporaneous motions to declassify, as Judge Becker found was true of the plaintiffs in *Zenith*. *See id.* Second, the argument that the defendants' reliance on P.T.O. No. 2 during years of discovery shields them now from the burden of justifying protection of the documents ignores the fact that civil litigants have a legal obligation to produce all information "which is relevant to the subject matter involved in the pending action," Fed. R. Civ. P. 26(b)(1), subject to exceptions not involved here. Thus, defendants cannot be heard to complain that their reliance on the protective order was the primary cause of their cooperation during years of discovery: even without P.T.O. No. 2, I would eventually have ordered that each discoverable item be turned over to the plaintiffs. Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) or countenanced by the common law of access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right. Finally, in light of the considerable passage of time since P.T.O. No. 2 was issued and the absence in the record of any indication that the defendants carried the burden of showing that a substantial and specific harm to their competitive positions would result if the documents were disclosed, I do not believe it unfair to require the defendants to show at this juncture that some (if any) of the documents here at issue are currently worthy of protection.

Accordingly, the defendants are invited to suggest to the court, not later than ten days hence, a time period within which they shall submit any of the subject documents (described in footnote 9) that they believe truly to be worthy of continued protection. Defendants shall serve that paper upon the movants herein, and the latter may propose, if they wish, a different time period. When

submitting the documents, defendants may also submit memoranda explaining why categories of information ought to remain sealed and identifying which documents fall into each category. The defendants shall serve any such memoranda upon the *State* and *Long Beach* plaintiffs' liaison counsel.[10] The plaintiffs shall have the opportunity to oppose, by written brief, the defendants' designations. I wish to make clear my intention to withhold from the public only that information that remains a trade secret or is actually commercially sensitive such that its disclosure would cause more harm to defendants' competitive positions than its nondisclosure would to the public's access interests.

In Section III C., above, I explained that the danger of prejudicial pretrial publicity is weak at present. No trial date has been set, and the resolution of the various motions for summary judgment and other pretrial matters will occupy several additional months. It should also be noted that defendants' privacy interests in the documents do not rise to the level found in *Tavoulareas*, *supra* (slip op. at 23-26), since the materials here at issue will play a part in adjudication. I further admonish the defendants that their conclusory statements regarding commercial sensitivity made thus far in connection with the instant motions to declassify will not suffice to establish that there is a significant and specific need for continued protection.

V. PROTECTION FOR THIRD PARTIES

Getty Oil Company, once a defendant in the *State* cases, urges the court to make provision for the privacy

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[10] The *Long Beach* plaintiffs, who support declassification, have access to the *Long Beach* files and are currently subject to the protective order. Dow Jones is not in this position, and to disclose the contested documents to Dow Jones for purposes of participating in this final determination would compromise any legitimate trade secrets contained in the files. *See* In re Iowa Freedom of Information Council, *supra* note 8, at 6.

and property interests in trade secrets and commercially sensitive information of third parties, such as itself. Getty asserts that it and other third parties have produced many documents to both the *State* and *Long Beach* parties and that some of these materials, now filed under seal, are among the papers that Dow Jones seeks to declassify. The fact that some of the documents submitted in connection with the motions for summary judgment are papers produced from third parties does not take those documents out of the category to which the public has a presumptive right of access. On the other hand, third parties have a right to know which of the sealed documents they produced are among those subject to disclosure so that they can argue that the disclosure would cause a specific and serious injury to their commercial interests. The following procedure should accommodate both sides. All parties shall review all documents presumptively subject to declassification submitted by them and deliver to any non-party a copy of any document containing information produced by such non-party.[11] Such a non-party may then take part in the briefing procedure described in the preceding section by moving to intervene for that limited purpose. Upon intervention, a third party seeking to retain the confidentiality of documents shall agree to pay to the party incurring such costs a reasonably proportionate share of the expenses entailed in the review, copying and delivery of documents to the third party. When the proposed screening process shall have been completed, the current protective order will be

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[11] If such a document contains sealed information that was *not* produced by the non-party, the party delivering the document shall take reasonable precautions to ensure that no improper disclosure occurs. The delivering party shall indicate the location from which each document was retrieved (for example, "exhibit 5 to defendant's memorandum in opposition to —— motion,") so that the third party may identify the document for the court. The delivering party shall also send a copy of this decision to the third party.

lifted from all requested documents (including those described in footnote 9) other than those to merit continued confidentiality.

IT IS SO ORDERED.

DATED: February 9, 1984.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL-150 WPG

ALL CASES

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM TO COUNSEL

[Filed April 6, 1984]

The order implementing my Memorandum of Decision of February 9, 1984, regarding declassification of documents will be filed concurrently with this memorandum. You will note the provision in the order for a stay pending appeal.

In my view, the instant order is appealable under the collateral order doctrine. The order and decision of February 9 are more than an implementation of the umbrella protective order in this case. First, I acknowledge that my current order, at least in some respects, virtually stands Judge Clarie's order on its head. The latter leaves much discretion to the party seeking confidentiality, and it imposes upon the party seeking declassification the burden of accomplishing removal of the confidential designation. The current order, and the decision upon which it is based, shift the burden to the party that seeks to retain the classification. Such shifting of burden occurs long after the parties have submitted papers in reliance upon the protective order.

Of course, I did rely on the protective order to the extent that it contemplates that the party making a confidential designation does so only when the document contains a trade secret or is otherwise commercially sensitive. Second, the decision and order involve the question of whether, and to what extent, the public has a right of access to civil pretrial materials, and the question of the proper balance between such access interests and the interests in confidentiality.

Naturally, I believe that the order, which implements the decision and initiates the balancing process, is appropriate. However, I recognize that it raises important and controversial issues. As the February 9 decision acknowledges, there is little judicial authority concerning this matter, and the order involves more than the exercise of judicial discretion. *Cf. Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541, 547 (1949).

It seems to me that the propriety of the current order should be authoritatively resolved before the defendants are obliged to undertake the laborious and expensive tasks of reviewing the many documents involved, assessing their sensitivity, and briefing the court on the continuing need for confidentiality. If the current order is not stayed now and is adjudged on appeal to be wrong, the above expressed undertaking will have been wasted. If the order is stayed now and upheld, the rationale upon which it is based will have been vindicated, and there would be little justification for a second appeal of a later decision concerning declassification of particular documents. *Cf. Iowa Beef Processors v. Bagley*, 601 F.2d 949 (8th Cir.) *cert. denied*, 99 S. Ct. 1977 (1979).

It is my opinion that the decision on appeal of the current order implementing the February 9 decision will finally resolve some very important issues in this litigation. If the Court of Appeals does not deem the current order to be an appealable collateral order, I submit this

memorandum as a certificate in support of an interlocutory appeal under 28 U.S.C. § 1292. If neither of these forms of appeal is acceptable to the appellate court, I would welcome consideration of mandamus as a means of giving guidance to this court.

DATED: April 6, 1984.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL No. 150 WPG
(All Cases)

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM AND ORDER RE EFFECT OF STAY

[Filed September 6, 1984]

This matter originally came before this Court as an application by defendants for a temporary restraining order restraining intervenor Dow Jones & Company, Inc. ("Dow Jones" or "intervenor") from receiving or obtaining any presently-sealed discovery documents. At the hearing, the parties entered into a "standstill" stipulation treating Judge Gray's April 6th stay of his declassification order (the "Stay") as being in effect, pending the hearing on defendants' request for a preliminary injunction. Intervenor, in turn, has filed a motion for access to sealed documents, *i.e.*, to unseal them. Responding to Dow Jones' First Amendment arguments, defendants now seek an order that the Stay "will remain in effect."

By his April 6, 1984 order, after due consideration of the issues, see Memorandum of Decision entered Feb. 10, 1984, Judge Gray set forth the procedure under which documents subject to seal under the protective order in

MDL No. 150 would be subject to declassification. The Stay, which is paragraph (6) of that order, provides:

> "This order is hereby stayed for thirty days, and thereafter pending appellate review if defendants shall have joined in a request to the Court of Appeals for an expedited review."

Apparently, the condition of expedited review has been met. Although not specifically cited, Judge Gray was clearly exercising his discretion under Fed. R. Civ. P. 62. At least three appeals were taken from this order to the Ninth Circuit. In No. 84-5824 and No. 84-8076 the appeals of Dow Jones were, respectively, dismissed and denied. Defendants' appeal from the declassification order, No. 84-5878, apparently remains pending. Intervenor also filed a petition for writ of mandamus against this Court, No. 84-7262, in which the only remedy apparently sought was to vacate the stay. By order filed June 19, 1984, the petition was granted and the Stay vacated (the "Mandamus Order").[1] It is not contested that defendants filed a timely petition for rehearing, within the meaning of Fed. R. App. P. 40(a). The Court of Appeals has not acted on the petition for rehearing or suggestion for rehearing en banc. Neither has it acted on defendants' emergency motion for clarification of jurisdiction and for stay pending appeal, which was subsequently filed.

The basic issue here is whether that filing postponed the effectiveness of the Mandamus Order under Fed. R. App. P. 41(a) and, if not, whether this Court can and should continue the Stay.

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[1] Because it is of some importance, a copy of the Mandamus Order, together with a page from the District Court docket indicating its receipt is appended hereto. As can be seen, the Clerk's certification bears the notation, "This certification constitutes the mandate of the Court."

At the hearing on August 23, 1984, this Court was concerned with its jurisdiction to hear this dispute and whether it was being asked to render an advisory opinion. On further reflection, however, and in light of further facts now known to it[2] and the briefing of the parties, although some doubt remains, I conclude that the district court has jurisdiction to act.

In support of their position that the Stay remains in effect, defendants rely on Fed. R. App. P. 41(a)'s provision that, "The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court."[3] Rule 41(a) also provides that "A certified copy of the judgment . . . shall constitute the mandate, unless the court directs that a formal mandate issue." No such direction was made here; therefore, the Mandamus Order itself is the mandate. Further, I am forced to conclude that the sentence in Rule 41(a) relied on does not apply here, because the Court has "otherwise ordered," by the Clerk's certification thereon that "This certification constitutes the mandate of the Court." Thus, the mandate has issued and has been docketed in the District Court.

It is customary practice by the Ninth Circuit Clerk in mandamus cases to have the order serve as the mandate.[4] Thus, what happened in this case conforms with custom.

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[2] Some of the facts alluded to here are not in the district court record. I have concluded, however, that judicial notice may be taken of such facts. Fed. R. Evid. 201(b)(2) & (c). They are facts pertaining to the practice of the Clerk of the Ninth Circuit and his actions in this matter. The accuracy of these facts are equally determinable by the Court of Appeals.

[3] I assume, *arguendo*, that Rules 40 & 41 apply to mandamus proceedings. Fed. R. App. P. 1.

[4] Defendants' contend that this customary practice is "unauthorized and invalid". This Court exercises no supervisory power over the Clerk of the Ninth Circuit; the argument is directed to the wrong court and will not be considered.

However, this Court is also given to understand that issuance of the mandate in this case was a clerical error.[5] Nevertheless, given the fact that the mandate has issued, and in the absence of any subsequent order recalling the mandate, it is at least arguable that appellate court jurisdiction has been relinquished and the trial court's jurisdiction to act fully restored.

However, because a petition for rehearing is pending, I cannot be certain that the Court of Appeals intended to relinquish its jurisdiction, *i.e.*, it is at least plausible that issuance of the mandate was a clerical error which the Court of Appeals should be given an opportunity to correct. Therefore, in the alternative, this appears to be a proper case in which this Court should act to protect the Circuit's appellate jurisdiction. *In re Thorp*, 655 F.2d 997, 998 (9th Cir. 1981). Appellate jurisdiction in this case involves both rehearing on the Mandamus Order and the possibility that failure to act will moot the appeal in No. 84-5878.[6]

Since I conclude, arguably at least, that the District Court has jurisdiction to act in the premises and that such action is necessary and not advisory, for the rea-

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[5] Another obvious error on the face of the Mandamus Order is its "Attest" date of May 19, 1984; a date that predates the Motions Calendar date noted thereon of 5/28/84. No doubt the intended "Attest" date was June 19, the date the order was filed.

[6] Appellate jurisdiction also is involved in another sense. The usual writ of mandamus (if there is such a thing) is in the form of a command to the respondent court to take some specified action, here to vacate the stay. In contrast, the form of the Mandamus Order is to vacate the stay directly. Undoubtedly, that is because a District Court Stay under Fed. R. Civ. P. 62, is action on a matter primarily within the Court of Appeals' jurisdiction under Fed. R. App. P. 8. *See* Fed. R. Civ. P. 62(g). Part of the ambiguity in these proceedings has arisen because intervenor chose to file a separate mandamus proceeding, rather than a motion in defendants' appeal to vacate the stay.

sons stated above, I proceed to exercise my discretion to do so.

The only issue here is whether the *status quo*[7] should be maintained in whole or in part and, if so, for how long.[8] I further act on the premise that issuance of the mandate (in the form of the Mandamus Order) was inadvertent or a clerical error.[9] If such were the case, then obviously the Circuit did not intend that the matter be mooted without opportunity to act on the petition for rehearing.[10]

Judge Gray was careful to detail his concern that the opportunity for authoritative appellate resolution of the declassification order be preserved. Memorandum to Counsel filed Apr. 6, 1984. I seek by this order to do no more, only to preserve to the extent necessary the *status quo*, pending a determination by the Court of Appeals of the petition for rehearing or its order that the Mandamus Order was, indeed, intended to be final forthwith. I seek only to insure that the Court of Appeals' jurisdiction is not inadvertently frustrated.

For the foregoing reason, IT IS ORDERED:

1. The sixty (60) day period and the seventy (70) day period of paragraph (3) of the Order signed and

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[7] The *status quo* under the Stay has continued. Under the Stipulation and Order of Aug. 23, 1984, all parties have continued to treat the Stay "as being in full force and effect."

[8] I fail to perceive any First Amendment issue, apart from the issues involved in underlying stay, that should not, on balance, give way to the Court of Appeals' opportunity to consider the petition for rehearing before the issue is mooted.

[9] My action here is only to allow the Court of Appeals the opportunity to correct such clerical error, if any there be. If I am mistaken, it will be a simple matter for a motions panel to vacate this order and to order that the mandate issue forthwith.

[10] Although it is true that the appeal in No. 84-5878 would also be mooted, it would appear that the Mandamus Order was issued on the likely assumption that that would be its probable result.

filed herein on April 6, 1984, and entered on April 12, 1984 (the "Declassification Order") shall commence to run as of the date of this order.

2. Declassification of documents identified in paragraph (1) of the Declassification Order, but submitted for further protection pursuant to paragraphs (3) or (4), thereof, shall be stayed in accordance with paragraph (4), below.

3. Any action by the Court pursuant to paragraph (5) of the Declassification Order shall be stayed in accordance with paragraph (4), below.

4. The order in paragraph (1), above, and the stay in paragraphs (2) and (3), above, shall remain in effect until seven (7) days after disposition by the Court of Appeals of the petition for rehearing of real parties in interest in No. 84-7262, Fed. R. App. P. 41(a), unless otherwise ordered by said Court or a judge thereof. Fed. R. App. P. 8(a).

Dated: Sep. 6, 1984

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

C-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7262

DC# MDL-150 WPG
Central California

DOW JONES AND COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

STATE OF ARIZONA; STATE OF CALIFORNIA, *et al.*,
Real Parties in Interest.

ORDER

[Filed June 19, 1984]

Before: SCHROEDER, ALARCON and FERGUSON, Circuit Judges

The petition for a writ of mandamus is granted. The stay pending appeal of the disclosure procedure ordered by the district court is vacated.

A TRUE COPY
ATTEST May 19, 1984
PHILLIP B. WINBERRY

by: /s/ Verna Trouis
Deputy Clerk

This certification constitutes the mandate of the Court.

[Lodged June 21, 1984]

[Appeals Update Sheet Completed By 6-21-81]

MoCal 5/28/84

Date	PROCEEDINGS
	LODGED EXH OF DONALD N. GRAHAM TKN 1-26-82
	LODGED DEPO OF KENNETH E. ALLEN TKN 5-28-81 w/exh
	LODGED DEPO OF ALBERT G. LAVERTY TKN ON 1-14-82 w/exh
	LODGED DEPO OF ANTHONY TURANO Jr TKN on 2-3-82 w/exh
	LODGED DEPO OF HERBERT C. TENNY TKN ON 3-11-82 Vol 1A
	LODGED DEPO OF HERBERT C. TENNY TKN on 3-11-82 Vol IB
	LODGED DEPO OF HERBERT C. TENNY TKN ON 3-12-82
	LODGED EXH OF HERBERT C. TENNY TKN ON 3-11-82
	LODGED DEPO OF ARTHUR J. KOHLER TKN ON 2-1-82
	LODGED EXH OF ARTHUR J. KOHLER TKN ON 2-1-82
	LODGED DEPO OF C. NICHOLAS TINGLEY TKN ON 1-20-82 Vol 1A
	LODGED DEPO OF C. NICHOLAS TINGLEY TKN ON 1-20-82 Vol 1B
	LODGED DEPO OF C. NICHOLAS TINGLEY TKN ON 1-28-82 Vol 2A
	LODGED DEPO OF C. NICHOLAS TINGLEY TKN ON 1-28-82 Vol 2B
	LODGED EXH OF C. NICHOLAS TINGLEY TKN ON 1-20-82
	LODGED DEPO OF LINN M. KELLEHER TKN ON 12-18-81

Date		PROCEEDINGS
		LODGED DEPO OF LINN M. KELLEHER TKN ON 12-18-81
		LODGED EXH OF LINN M. KELLEHER TKN ON 12-18-81
		LODGED DEPO OF HAROLD L. MANTHEI TKN ON 12-15-81 Vol IA
		LODGED DEPO OF HAROLD L. MANTHEI TKN ON 12-15-81 Vol IB
		LODGED DEPO OF HAROLD L. MANTHEI TKN ON 12-17-81 Vol 2
		LODGED EXH TKN OF HAROLD L. MANTHEI TKN ON 2-15-81
		LODGED DEPO OF LAWRENCE GABRIEL RAWL TKN ON 2-8-82
		LODGED DEPO OF LAWRENCE GABRIEL RAWL TKN ON 2-8-82
		LODGED EXH OF LAWRENCE GABRIEL RAWL TKN 2-8-82
		LODGED EXH OF LAWRENCE GABRIEL RAWL TKN ON 2-8-82
6-8-84	sb	Fld motn fr lv propound disc req regarding April 1973 meeting in the Bahams & suppting memo
6-18-84	sb	Fld deft opp to pltf motn fr bifurcation of issue fr separate trials
6/21/84	clh	LODGED cc of ORD frm 9th Cir C/A Denying the petn to appeal.
	clh	LODGED cc of ORD frm 9th Cir. C/A Granting the petn for a writ of mandamus. The stay pending appeal of the disclosure procedure ordered by the district court is Vacated.

Date		PROCEEDINGS
	clh	LODGED cc of ORD frm 9th Cir. C/A Granting the deft'-s motn to dismiss. (CA 84-5824)
6-28-84	cy	7. Fld def's opp to mots fr leave to propound discov requests
7-5-84	cy	8. Fld plt's reply to def's opp to mots fr leave to propound discov requs
7-6-84	cy	9. Fld plt's ntc of mtn fr prelim approv of settlements & suppt memo
7-9-84	cy	10. Fld plt's suppl. memo in opp to def's mtn fr summ judgmt—UNDER SEAL
7-9-84	cy	11. Fld. reply memo in suppt of def's mts to exclude plt's damage studies &

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5824

DC# MDL 150 WPG
Central California

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

THE CITY OF LONG BEACH, as Trustee for the State of California and the State of California as Beneficiary, *et al.*,
Plaintiffs-Appellees,

and

DOW JONES & COMPANY, INC.,
Intervenor-Appellant,

vs.

STANDARD OIL CO. OF CALIFORNIA, *et al.*,
Defendants-Appellees.

ORDER

[Filed June 19, 1984]

Before: SCHROEDER, ALARCON and FERGUSON, Circuit Judges

The defendants' motion to dismiss is granted. The appellant does not challenge any portion of the district court order that finally determines the rights of a party.

A TRUE COPY
ATTEST June 19, 1984

PHILLIP B. WINBERRY
Clerk of Court

by: /s/ P. Williams
Deputy Clerk

[Appeals Update Sheet Completed By 6-21-84]

[Lodged June 21, 1984]

MoCal 5/28/84

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-8076

DC# MDL-150 WPG
Central Division

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

ORDER

[Filed June 19, 1984]

Before: SCHROEDER, ALARCON and FERGUSON, Circuit Judges

The petition for permission to appeal is denied. Review of the district court order of April 6, 1984, would not materially advance the ultimate termination of the litigation.

A TRUE COPY
ATTEST June 19, 1984

PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Sigmon Zielter
Deputy Clerk

MoCal 5/28/84

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 (WPG)

ALL CASES

IN RE COORDINATED PRETRIAL PROCEEDINGS IN
PETROLEUM PRODUCTS ANTITRUST LITIGATION

STIPULATION AND ORDER

[Filed August 22, 1984]

Defendants identified below ("Defendants"), all plaintiffs and Intervenor Dow Jones & Co., Inc. ("Dow Jones") hereby stipulate and agree as follows:

1. Pending disposition of the application for preliminary injunction filed by defendants on August 22, 1984, defendants, plaintiffs and intervenor Dow Jones will treat the stay of Judge William P. Gray's Order dated April 6 and entered on April 12 which is set forth in paragraph 6 of said Order as being in full force and effect and fully applicable to defendants, plaintiffs and intervenor Dow Jones.

2. The Memorandum filed on August 22, 1984 by defendants will be treated as defendants opening brief in support of their application for preliminary injunction.

3. Plaintiffs and Dow Jones will have until 5:00 p.m. Wednesday, August 29, 1984 to file and serve by hand a brief in opposition to the application for preliminary injunction.

4. Defendants will have until 5:00 p.m., Tuesday, September 4, 1984 to file and serve by hand a reply brief in support of the application for preliminary injunction.

5. Hearing on the application will take place at 9:30 a.m. on Thursday, September 6th or as soon thereafter as is convenient for the court, in Courtroom No. 6.

Dated: August 23, 1984

DONOVAN LEISURE NEWTON
& IRVINE

/s/ Vincent Tricarico
VINCENT TRICARICO

DONOVAN LEISURE NEWTON
& IRVINE
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Los Angeles, California 90071
Telephone: (213) 253-4000

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Mobil Oil Corporation and
on behalf of defendants

Atlantic Richfield Company
Exxon Corporation
Gulf Oil Corporation
Shell Oil Company
Phillips Petroleum Company
Standard Oil Company
of California
Texaco Inc.

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KINSELLA, BOESCH, FUJIKAWA
& TOWLE

/s/ Philip W. Boesch, Jr.
PHILIP W. BOESCH, JR.

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& TOWLE
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#1600
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Telephone: (213) 552-9496

Attorneys For and On Behalf
of Intervenor Dow Jones
& Co. Inc.

The above stipulation is SO ORDERED

Dated: August 23, 1984

/s/ Wallace Tashima
WALLACE TASHIMA
U.S. District Court Judge

STATUTORY APPENDIX

STATUTORY APPENDIX

TITLE 28 UNITED STATES CODE

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

§ 2077. Publication of rules; advisory committees

(a) The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published. Each court of appeals shall print or cause to be printed necessary copies of the rules. The Judicial Conference shall prescribe the fees for sales of copies under section 1913 of this title, but the Judicial Conference may provide for free distribution of copies to members of the bar of each court and to other interested persons.

(b) Each court of appeals shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of the court of appeals. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.

(Added Pub.L. 97-164, Title II, § 208(a), Apr. 2, 1982, 96 Stat. 54)

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of

the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

Rule 45. Duties of Clerks

(c) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

Rule 47. Rules by Courts of Appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time

to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Rule 3. Time and Place of Hearings

(a) Classes of Cases to be Submitted Without Oral Argument. Pursuant to Rule 34(a), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which a three judge panel of this court is of the unanimous opinion that:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed.

When a case has been classified by the court for submission without oral argument, the clerk shall give the parties notice in writing of such action. The parties shall have seven days from the date of the clerk's letter

in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.

(b) Designation in General. Appeals, applications for original writs, and petitions to review or enforce orders or decisions of administrative agencies may be heard at any session of the court in the circuit, as designated by the court.

Rule 22. Delegation of Authority to Act on Motions

With the approval of the Court, the Chief Judge may delegate in writing to the Clerk, or to a designated staff attorney acting as a deputy clerk for this purpose, authority to act on specified motions subject to disposition by a single judge, upon the following conditions: (1) the motion is unopposed, and (2) the order entered on the motion does not dispose of the appeal. The order disposing of the motion is expressly subject to reconsideration by a judge of the Court if exception is received within ten (10) days of the entry of the order.

The Clerk will have the authority to grant oral extentensions of time to file the transcript in civil appeals. These extensions will be for no more than fourteen (14) days and will be subject to reconsideration if opposition is filed by either party within ten (10) days.

APPENDIX OF AFFILIATED COMPANIES

AFFILIATED COMPANIES

Atlantic Richfield Company

Acerlan, S.A.
Alyeska Pipeline Service Company
Anaconda-Ericsson Inc.
Anamax Mining Company
Arilan, S.A. de C.V.
Atlantic Richfield de Mexico, S.A. de C.V.
Badger Pipeline Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Centroamericana de Cobre, S.A.
Cobre de Hercules, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera Dos Republicas, S.A. de C.V.
Compania Minera Kappa, S.A.
Compania Minera Penacobre, S.A.
Cook Inlet Pipe Line Company
Cupro San Luis, S.A. de C.V.
Delaware Bay Transportation Company
Dexter de Mexico, S.A.
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Eisenhower Mining Company
Empresa de Comercio Exterior Mexicano, S.A. de C.V.
Energy Transportation Systems, Inc.
Fip, S.A.
Flower Street Limited
F.T.L. Company Limited
Gravity Adjustment, Inc.
Griffith-Consumers Company
Hardy Oil Company
Hydrokem Performance Chemicals Company
Imperial Eastman de Mexico, S.A.

Impulsora De Cobre, S.A. de C.V.
Industrias Nacobre, S.A. de C.V.
Industrias Tecnos, S.A. de C.V.
Inval, S.A.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kronos, Computacion y Teleproceso, S.A. de C.V.
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Lingobronce, S.A.
Magnaval, S.A.
Manguera Flex, S.A. de C.V.
Manufacturera Mexicana De Partes Para Automoviles, S.A. de C.V.
Mayflower Mining Company
R. W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica
Nacional de Cobre, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
P. T. Arutmin Indonesia
Panaval, S.A.
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Patten Mining Company
Platte Pipe Line Company
Productos Especiales Metalicos, S.A.
Servicios Industriales Nacobre, S.A.
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Solvamex, S.A. de C.V.
Swecomex, S.A.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

Trans Mountain Oil Pipe Line Company
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
The Walworth Company
West Mayflower Mining Company
William Prym de Mexico, S.A.

Gulf Oil Corporation

A/S Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Allied-General Nuclear Services
Andogas S.A. (Switzerland)
Asia Polymer Corp.
Autobahn-Raststaette Wuerenlos AG
China Gulf Oil Company Limited
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Emery Joint Venture
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleen Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
Forenade Svenska Oljeimportorers AB
Gulf Canada Limited
Gulf Oil Canada Limited Associated Companies
Gulf Oil Corporation Erisa
Gulf Oil Terminals (Ireland) Limited
Gulf Oil Zaire S.A.R.L.
Harshaw - Byrce & Co. Pty. Ltd.
Harshaw - Juarez S.A. de C.V.
Harshaw - Murata Kabushiki Kaisha
Harshaw Galvanotecnia S.A.
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GmbH

Insco Holding & Finance Company N.V.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipe Line Company
Mainline Pipelines Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Petrosil Oil Company Limited
Plastigama, S.A.
Plastijal Sociedad Anonima
Platte Pipeline Company
Pol Transport AB
Pyropower Corporation
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A. - Refining
Solvent Refined Coal International, Inc.
Solvo Finanzierungs-Und Beteiligungs AG
Sunrise International Company Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Taita Chemical Corporation
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company
Standard Oil Company of California

Mobil Oil Corporation

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.

Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co. KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ammenn GmbH
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian Energy Company Limited, The
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM

Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Beer GmbH
Bear GmbH & Co.
Mineralol-Vertriebs-KG
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Braamkey Investments (Proprietary) Limited
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canners' Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Columbia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Columbianos Forestadores, S.A.
Colonial Pipeline Company
Comet-Brennstoffdienst GmbH
Commercial Polymers Pty. Ltd.
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun

Compagnie D'Entreposage Communautaire
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania Colombiana De Forestacion S.A.
Compania de Lubricants de Chile Limitada
(Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales,
S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
Corrugadora de Carton, S. A.
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba. Industria Petrolifero
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre

Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Ets. Le Goff
Ets. R. Saillard
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibril, S.A.
Fibras Internacionales de Puerto Rico, Inc.
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
First Eastleigh No. 163 (Proprietary) Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)

Handelmaatschappij Hugenholtz & Co. B.V.
H. van der Heijden Service Stations B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Inmunizadoras Unidas, S. A.
Industria De Carbon Del Valle Cauca, S.A.
Industria Interamericana De Filtros Ltda. (INTERFIL)
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Iside, S.p.A.
Istanbul Petrol ve Makine Yasglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K.D. Keysers Investments (Proprietary) Limited
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kyguns Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha

Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Lobe Chemie Gesellschaft mbb
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mertl GmbH
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Maroc
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Portuguesa, S.A.R.L.
Mobil Tunisie
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.

Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Berau Coal
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
P-6—Group B.V.
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe Line Benal de La Goulette
Plegadizos para La Industria S.A.
Poly Oil Chimie (P.O.C.)
Prespak (Proprietary) Limited
Qatar Petroleum Company Limited
Qualbank, Inc.

Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedad Calle 67, Ltda.
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile

Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.

Societe Jean Roussel S. A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Malienne D'Entreposage (SME)
Societe Nationale de Raffinage (Sonara)
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Kohn-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Maintenance Kabushiki Kaisha
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.

Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft mbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company Limited
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wilbelm Mertl GmbH & Co. KG
Wolverine Pipe Line Company
WSG, Warme Service GmbH
Wyco Pipe Line Company
Wymondham Oil Storage Co., Limited
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

Phillips Petroleum Company

Aero Oil Company
Acurex Corporation
Alyeska Pipeline Service Company
Canyon Reef Carriers Inc.
Chisholm Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Everglades Pipe Line Company
Explorer Pipeline Company
Great Yarmouth Port Labor Company Limited
Heat Transfer Research, Inc.

Industries Negromex, S.A. de C.V.
Kaw Pipe Line Company
Kenai LNG Corporation
Papago Chemicals, Inc.
Phillips Gas Supply Corporation
Phillips Pacific Chemical Company
Phillips Petroleum Toray, Inc.
Salk Institute Biotechnology/Industrial Assoc. Inc.
Seadock, Inc.
Seaway Pipeline, Inc.
Transatlantic Reinsurance
White River Shale Oil Corporation
Arctic LNG Transportation Company
Calatrava Empresa Para la Industria Petroquimica, S.A.
Canada Western Cordage Co., Ltd.
Cochin Refineries Ltd.
Compagnie Francaise du Carbon Black S.A.
DRISCO S.A. de C.V.
Insurance and Reinsurance Brokers (Bermuda) Limited
Iranian Marine International Oil Co.
Nordisk Philback AB
Norland GmbH Fur Grundbesitz Und Industrieulagen
Norpipe A/S
Norpipe Petroleum U.K. Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Oil Insurance Limited (New)
Petrochim
Phillips Carbon Black Co. (Pty.) Ltd.
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips Imperial Petroleum Limited
Phillips Petroleum Singapore Chemicals (Private) Limited
Philmac Oils Limited
Philmac Panama Inc.

Plasticos Vanguardia S.A.
Polar LNG Shipping Corporation
Quimica Veneco C.A.
Renolit Fertighaus GmbH
Sevalco (Holdings) Limited
SPODCO Ltd.
Venezoil, C.A.
Western Desert Operating Petroleum Co.
Seralco Limited
Spodco-USA, Inc.
Trenwick Limited

Shell Oil Company

Basin Pipe Line System
Bullenbay Marine Services, N.V.
Business Development Corporation of North Carolina
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Capital Corporation
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Fractionation Research, Inc.
George Newman & Company
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.

MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Ltd.
Olympic Pipe Line Company
Ozark Pipe Line Company
Penn Central Corporation
Plantation Pipe Line Company
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Limited
Ship Shoal Pipe Line System
Thums Long Beach Company
United Scientific, Inc.
West Shore Pipe Line Company
WIDC
Wolverine Pipe Line Company

Texaco Inc.

Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigeria) Limited
Quimica Industrial "FIDES" S.A.
Texaco Canada Inc.
Public Fuel Transmission Systems Limited
Great Eastern Oil & Import Co. Limited, The
Texaco Norway A/S
Deutsche Texaco Aktiengesellschaft
Texaco Portugal Prospeccao e Producao, S.A.R.L.
Texaco Exploration Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.
Texaco Nigeria Limited
Texaco-Cities Service Pipe Line Company
Tadlaqaz S.A.
American Overseas Petroleum Limited

Bunkerservice Brunsbuttel GmbH
Societe Ivoirienne De Futs et D'Emballages (SIFEMBAL)
Societe Guineenne De Lubrifiants et D'Emballages (SOGUILUBE)
Caltex Petroleum Corporation
Australian Lubricanting Oil Refinery Limited
Phoenicia Oil Company S.A.L.
Sydney Metropolitan Pipeline Pty. Limited
Koa Oil Company, Limited
Mediterranean Refining Company
Nippon Petroleum Refining Company, Ltd.
Tokyo Tanker Company, Limited
Caltex Deutschland GmbH
Caltex Mediterranean Limited
Condea Chemie GmbH
Federated Pipe Lines Ltd.
Flexibox GmbH
LPG de Panama, S.A.
Pembroke Capital Company, Inc.
P.T. Caltex Pacific Indonesia
Petrogas, S.A.
Texaco Maroc
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Bonafides Grundstueksverwaltunggesellschaft mbH & Co. Vermietungs KG
Bayswater Nominees Pty. Ltd.
Hunter Pipeline
Majik Markets
Caltex Australia Limited
Ful-Tex Euro Services Inc.
West Australian Petroleum Pty. Limited
Honam Oil Refinery Company, Limited
Korea Tanker Company Limited
Societe Ivoirienne D'Entrepasage De Produits Petroliers (S.I.E.P.P.)
Texaco Ghana Limited
Manafil Limited

CandT Orient Inc.
Badger Pipe Line Company
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Colonial Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
LOOP Inc.
Olympic Pipe Line Company
Portland Pipe Line Corporation
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
Aktiebolaget Svensk Petroleumlagring
Alberta Products Pipe Line Ltd.
Arabian American Oil Company
Associated Octel Company Limited, The
Aviation Fuel Services Ltd.
Boral Limited
New Zealand Refining Company Limited, The
South Africa Oil Refinery (Proprietary) Ltd.
Batangas Land Company Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Central African Petroleum Refineries (Private) Ltd.
East African Oil Refineries Limited
H. C. Sleigh Limited
Pakistan Refinery Limited
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage (S.R.E.)

Deutsche Transalpine Olleitung GmbH
Forenade Svenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiano S.A.
Ghana Bunkering Services Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Maghreb Gaz S.A.
Mainline Pipelines Limited
Milan Airport Refueling Services, S.p.A. (MARS)
Mitsui-Texaco Chemicals Co., Ltd.
Montreal Pipe Line Company Limited
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberheinische Mineralolwerke G.m.b.H.
Pars Investment Corporation
Pipelines of Puerto Rico, Inc., The
Raffinerie du Sud-Ouest S.A.
Rheem del Ecuador C.A.
Rhein-Mein Rohrleitungstransportgesellschaft mbH
Saudi International Petroleum Carrier Ltd.
Sierra Leone Petroleum Refining Company Limited, The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe D'Entreposage de Bobo-Dioulasso (SEB)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe De Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)
Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)

Societe Togolaise d'Entreposage S.A. (STE)
Svensk Petroleum Forvaltning Aktiebolag
Tankanlage AG Ruemlang (TAR)
Texaco Mexicana, S.A. de C.V.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinmar Limited
Trintovac Developments Limited
United Kingdom Oil Pipelines Limited
Unterflur-Betankungsanlage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services des Entreprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardsberg
Association Petroliere Belge
Aviation Fueling Services, S.A.
Aviation Service Center
Compagnie d'Entreposage Communautaire
Singapore Refining Company Private Limited
Societe Belge de Transport Par Pipeline S.A.
Svensk Petroleumadministration AB
Total Centrafricaine de Gestion
Societe Agricole des Entreprises Petrolieres
Union des Raffineurs Belges
Svensk Petroleumlagring Tre Aktienbolag
Societe Camerounaise des Depots Petroleirs (SCDP)
Trans-Northern Pipelines Inc./Pipelines Trans-Nord Inc.
Bergemann KG
Drapol International Limited
Bahrain National Gas Company (B.S.C.)
Farmer Construction Limited
Nippon Oil Staging Terminal Company, Limited
Newscastle Pipeline
Motorway Services Ltd.
Mdina Weave Ltd.

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No. 84-479

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
and TEXACO, INC.,
Petitioners.

OPPOSITION OF DOW JONES & COMPANY, INC. TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WEBB & TYLER
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**Counsel of Record*

Attorneys for Dow Jones & Company, Inc.

October 5, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a Court of Appeals has violated due process or the Federal Rules of Appellate Procedure by granting a petition for mandamus to release documents that the aggrieved party concedes are not commercially sensitive, without calling for a brief to be filed in the precise appellate docket in which the petition is granted and without calling for oral argument, when

   (a) the court has previously considered some 140 pages of briefing by the aggrieved party in four related docket numbers, including a 50-page brief directed solely to the issue;

   (b) failure to grant the petition would cause irreparable injury to public rights of access to judicial documents being considered by the district court and found by that court to be necessary to understanding the proceedings; and

   (c) the protective order under which the documents were originally sealed was intended only to protect commercially sensitive documents.

2. Whether the United States Supreme Court should order the Ninth Circuit to reinstate a district court stay before the Ninth Circuit has acted on pending motions for the same relief and where no arguable injury to rights on appeal will take place for at least 45 days after filing of the mandamus petition.

3. Whether the United States Supreme Court should exercise its mandamus powers to require a Court of Appeals to recall a mandate, when recall of the mandate will have no practical effect on the litigants below and where a motion to recall the mandate is pending before the Ninth Circuit.

TABLE OF CONTENTS

	Page
Questions presented	i
Statement of facts	1
Argument	6
I	
Mandamus is neither necessary nor appropriate	7
A. The documents at issue here are summary judgment papers, not mere discovery documents	8
B. Petitioners' interests will be adequately preserved through the ordinary course of appeal	10
II	
The Ninth Circuit neither acted *ex parte* nor abused its discretion in vacating the stay	14
A. The petitioners were given ample opportunity to be heard in the Ninth Circuit	15
B. The Ninth Circuit did not exceed its jurisdiction in vacating the stay	17
C. Petitioners are not likely to succeed on the merits of their appeal	21
1. The case law fully supports the April 12 decision	22
2. The policies behind public access require access at the adjudicative stage of court proceedings	24
3. Access at the adjudicative stage in no way jeopardizes the usefulness of umbrella protective orders	25
III	
Filing of a petition for rehearing does not automatically stay issuance of a writ of mandate	26
Conclusion	30

SUPPLEMENTAL APPENDIX

	Page
Order, Ninth Circuit Court of Appeals, filed September 15, 1983	G-1
Opposition of Plaintiffs City of Long Beach and State of California, Real Parties in Interest, to Emergency Motion to Recall Mandate and Petition for Clarification of Mandate	H-1
Notice of Entry, United States District Court	I-1
Memorandum of Decision, United States District Court	J-1

TABLE OF AUTHORITIES CITED

Cases

Page

Alexander v. Crollott, 199 U.S. 580 (1905) 11

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 18-19

American Telephone and Telegraph Co. v. Grady, 594 F.2d 594 (7th Cir.), *cert. denied*, 440 U.S. 971 (1979) 25, 28

Antonelli v. F.B.I., 553 F.Supp. 19 (N.D. Ill. 1982), *cert. denied*, ... U.S. ....., 104 S.Ct. 2399 (1984) 19

Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983) 23

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) 12

Becker v. United States, 451 U.S. 1306 (1981) 19

Brotherhood of Railway & S.S. Clerks, etc. v. National Mediation Board, 374 F.2d 269 (D.C. Cir. 1966) 19

Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir.), *cert. denied*, ... U.S. ....., 104 S.Ct. 1595 (1984) 22, 24

Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission, 260 U.S. 212 (1922) 19

Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (10th Cir. 1980) 9, 19

De Beers Consolidated Mines v. United States, 325 U.S. 212 (1945) 12

Evans v. Buchanan, 455 F.Supp. 705 (D.Del. 1978) 21

Ex parte Fahey, 332 U.S. 258 (1947) 11, 12

Ex parte Rowland, 104 U.S. 604 (1882) 12

Federal Communications Com. v. Station WJR, 337 U.S. 265 (1949) 16

Table of Authorities Cited

Cases

Page

First National Bank of Black Hills, 619 F.2d 774 (8th Cir. 1980) 20

Fitzgerald v. Compania Noviera La Molinera, 394 F. Supp. 402 (E.D. La. 1974) 19

Florida Businessmen for Free Enterprise v. City of Hollywood, 648 F.2d 956 (5th Cir. 1981) 21

George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc., 502 F.2d 1045 (5th Cir. 1974) 16

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 22

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir.), *cert. denied*, 394 U.S. 1012 (1969) 16, 17

Helstoski v. Meanor, 442 U.S. 500 (1979) 11, 12, 17

In re Application of National Broadcasting Co., 635 F.2d 945 (2d Cir. 1980) 23

In re Chambers, 44 Fed. 786 (1891) 24

In re Chicago, Rock Island & P.R. Co., 255 U.S. 273 (1921) 11

In re Continental Illinois Securities Litigation, 732 F. 2d 1302 (7th Cir. 1984) 9, 19, 22, 23

In Re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation (No. 84-5878) 14

In re Estelle, 516 F.2d 480 (5th Cir. 1975), *cert. denied*, 426 U.S. 925 (1976) 12

In re Greensboro News Co., 727 F.2d 1320 (4th Cir. 1984), *petition for cert. filed*, 52 U.S.L.W. 3908 (U.S. June 4, 1984) (No. 83-1995) 28

In re Letters Rogatory from the Tokyo District, 539 F.2d 1216 (9th Cir. 1976) 20

TABLE OF AUTHORITIES CITED

CASES

Page

In re Oliver, 333 U.S. 257 (1948) 23, 24

In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) 9

In re United States, 348 F.2d 624 (1st Cir. 1965) 17

International Products Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963) 9

Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 1498 (1983) 9

Kerr v. United States District Court, 426 U.S. 394 (1976) 17

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 11, 17

Local 391, International Bro. of Teamsters, Etc. v. Ward, 501 F.2d 456 (4th Cir. 1974) 28

McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982).... 21

Magnesium Casting Co. v. Hoban, 401 F.2d 516 (1st Cir. 1968), *cert. denied*, 393 U.S. 1065 (1969) 16

Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979) 9

Matter of Combined Reduction Co., 557 F.2d 179 (9th Cir. 1977) 19

Matter of Tiffany, 252 U.S. 32 (1920) 11

Merritt-Chapman & Scott Corp. v. Kent, 309 F.2d 891 (6th Cir. 1962), *cert. dismissed*, 372 U.S. 982 (1963) 12

Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) .. 23, 27

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) 24

N.L.R.B. v. Local No. 42, Int. Ass'n of Heat & F. I. & A. Workers, 476 F.2d 275 (3d Cir. 1973) 16, 17

TABLE OF AUTHORITIES CITED

CASES

Page

Ohio Environmental Council v. United States District Court, 565 F.2d 393 (6th Cir. 1977) 28

Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964) 24

Plekowski v. Ralston-Purina Co., 557 F.2d 1218 (5th Cir. 1977) 12

Press-Enterprise Co. v. Superior Court of California, ... U.S. ....., 104 S.Ct. 819 (1984) 22

Providence Journal v. F.B.I., 595 F.2d 889 (1st Cir. 1979) 19, 21

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 22, 23

Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976) 28

Sacramento Bee v. United States District Court, 656 F.2d 477 (9th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982) 27

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 11, 12, 17

Seattle Times Co. v. Rhinehart, ... U.S. ....., 104 S.Ct. 2199 (1984) 8, 9, 23

Tavoulareas v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984) 23

Times Newspapers Ltd. (Gr. Brit.) v. McDonnell Douglas Corp., 387 F.Supp. 189 (C.D. Cal. 1974) 9

United States v. Bondey, 171 F.2d 642 (2d Cir. 1948) 17

United States v. Criden, 648 F.2d 814 (3d Cir. 1981) .. 23, 24

TABLE OF AUTHORITIES CITED

CASES

	Page
United States v. Dorfman, 690 F.2d 1217 (7th Cir. 1982)	19
United States v. First National Bank of Black Hills, 619 F.2d 774 (8th Cir. 1980)	20
United States v. Harper, 729 F.2d 1216 (9th Cir. 1984)	28
Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958)	20
Warm Springs Dam Task Force v. Gribble, 565 F.2d 549 (9th Cir. 1977)	20
Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977)	20, 21
Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1980)	9, 23
Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978)	18
Will v. United States, 389 U.S. 90 (1967)	11, 18
York Intern. Building v. Chaney, 527 F.2d 1061 (9th Cir. 1975)	29
Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 529 F.Supp. 866 (E.D. Pa. 1981)	23

Constitution

Fourth Amendment	19

Statutes

28 U.S.C.:	
Section 1292(b)	3, 15
Section 1651	18
Section 1651(a)	11, 17

TABLE OF AUTHORITIES CITED

Rules

	Page
Federal Rules Appellate Procedure:	
Rule 21	27
Rule 34	16
Rule 41(a)	26, 27, 28, 29
Federal Rules Civil Procedure:	
Rule 26(c)	13, 14, 21
Rule 26(c)(7)	13
Rule 56(e)	10
Supreme Court Rule, Rule 27	16

No. 84-479

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
and TEXACO, INC.,
Petitioners.

OPPOSITION OF DOW JONES & COMPANY, INC. TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF FACTS

The underlying antitrust action that gives rise to this Petition involves allegations of price-fixing against nine major oil companies. The states of Arizona, California, Florida, Oregon and Washington and the City of Long Beach, California have charged petitioners with a conspiracy to contrive artificially the oil shortages of the mid-1970s and to depress the price of crude oil purchased from certain of the plaintiffs.

The litigation is over ten years old. Millions of public and private dollars have been spent in its prosecution. Discovery has been completed; the case has now reached the adjudicative stage. Motions for summary judgment have been filed, argued, and, in two instances, resolved. But the public remains ignorant of the details of this litigation because most significant documents, including all of the briefs and exhibits in support of and opposition to the motions for summary judgment, remain under seal in district court files.

For more than two and a half years, Dow Jones & Company, Inc.,[1] publisher of *The Wall Street Journal,* has sought access to these documents filed under seal. Twice, Dow Jones petitioned the Ninth Circuit for an order requiring the district court to rule on its motions for access. On September 15, 1983, the Ninth Circuit denied Dow Jones' petition without prejudice to renewal if the district court failed to rule on or before October 31, 1983. Dow Jones'

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[1]The list of subsidiaries and affiliated companies required by Rule 28.1 appears at page 2, footnote 2 of the Opposition of Dow Jones & Company, Inc. to Application for Stay and Temporary Injunctive Relief in Aid of This Court's Appellate Jurisdiction filed October 3, 1984.

Supplemental Appendix (hereinafter "Supp. App.") G. On April 12, 1984, more than two years after Dow Jones was granted permission to intervene, the district court finally ruled that Dow Jones and the public are entitled to contemporaneous access to the summary judgment documents. Petitioners' Appendix (hereinafter "App.") B-1 to B-3.[2] The court's order allowed the petitioner oil companies 60 days in which to submit lists of commercially sensitive documents they argue are entitled to continued protection. The remainder of the documents are to be released 10 days later, on the 70th day. App. B-2 to B-3.

The district court held that Dow Jones is entitled to contemporaneous access to the documents while the antitrust case is still pending and prior to resolution of the parties' motions for summary judgment. That ruling notwithstanding, the court stayed its order pending appeal.[3] App. B-3.

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[2]On the basis of the district court's February 9, 1984 Memorandum of Decision, Dow Jones moved to dismiss as moot its then-pending Ninth Circuit action. Voluntary dismissal was granted by the Ninth Circuit on February 24, 1984.

[3]Petitioners claim that Dow Jones did not oppose issuance of a stay by the district court. In fact, it did.

For the past 29 months Dow Jones' sole objective has been to secure speedy access to documents at issue here. In order to expedite full consideration of the issues, Dow Jones suggested on March 9, 1984 that the court "begin immediately and conclude as rapidly as practicable the document review procedure" set forth in the district court's February 10, 1984 memorandum. Dow Jones then suggested that a stay be entered upon agreement to an expedited appeal, but only *after* the Court "ruled on the motions of defendants and third parties for continued protection as to specific documents." Dow Jones' Response to Stay Motion at p. 3, ¶ 1-2. (9th Cir.). This suggestion of a stay to meet the district court's concerns is a far cry from the stay entered by the district court, which did not even

Despite the court's recognition of a contemporaneous right of access, Dow Jones thus faced further indefinite delay of the date on which the documents would become public. It therefore filed its Emergency Petition for Writ of Mandamus in the Ninth Circuit to vacate the stay of the district court order pending appeal.[4]

On April 26, 1984 the oil companies moved for an extension of time in which to respond to Dow Jones' motion to vacate the stay in the Ninth Circuit. On May 3, 1984 the court granted that motion in part and ordered the oil companies' brief filed on or before May 14, 1984.

On May 14, 1984 the oil companies filed a 50-page brief in opposition to Dow Jones' motion to vacate the stay. In that brief petitioners raised in detail every argument contained in their petition for rehearing and in the petition at issue here. In addition to their 50-page brief, the oil companies filed six other briefs totaling 90 pages, on the issue of the

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require petitioners to begin the task of identifying documents. Moreover, after the court indicated it would begin dispositive hearings on the *Long Beach* cases, Dow Jones filed a motion for expedited implementation of the February 10, 1984 memorandum, noting at p. 5, fn. 2, that "(a) stay pending appeal can no longer be considered appropriate in the *Long Beach* case."

[4]Because of the district court's own uncertainty about the appealability of its order, Dow Jones also filed a notice of appeal from the district court's stay of its order (No. 84-5824) and a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) (No. 84-8076). *See*, the district court's Memorandum to Counsel, dated April 6, 1984, App. B-25 to 26.

Petitioners have repeatedly criticized Dow Jones for failing to file a motion to vacate the stay in petitioners' own appeal docket. *See* Pet. at 21. But petitioners did not file their notice of appeal until 3 days *after* Dow Jones filed its emergency petition for writ of mandamus. At the time, there was no existing appellate docket in which Dow Jones could file.

appropriateness of the district court's stay.[5] Every argument and every case relied on by petitioners was fully presented to the Ninth Circuit at least once prior to the court's resolution of Dow Jones' petition for writ of mandamus and related actions.

On June 19, 1984 the Ninth Circuit granted Dow Jones' emergency petition, stating:

> The petition for a writ of mandamus is granted. The stay pending appeal of the disclosure procedure ordered by the district court is vacated.[6]

On June 26, 1984 the oil companies filed their Petition for Rehearing and Suggestion of Rehearing En Banc. Despite the fact that they had filed seven briefs on the stay issue, petitioners argued that the Ninth Circuit's order was issued "*ex parte*," in violation of their due process rights.

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[5]The other briefs are as follows:

(i) Respondents' Opposition to Application of Dow Jones & Company, Inc. to Vacate Stay Pending Appeal, dated May 14, 1984;

(ii) Appellees' Motion and Memorandum to Dismiss the Appeal, dated May 14, 1984;

(iii) Opposition to Plaintiff States Real Parties in Interest Motion for Leave to File A Brief In Support of Petitioner, dated May 25, 1984;

(iv) Reply to Appellant's Opposition to the Motion to Dismiss, dated June 4, 1984;

(v) Petition of Defendants' Real Parties in Interest for Rehearing, etc., dated June 26, 1984;

(vi) Response of Defendants Below to Dow Jones & Company's Motion for Leave to File An Opposition to Defendants' Petition for Rehearing and Suggestion of Rehearing En Banc, dated July 13, 1984.

[6]Appendix A-1 to Petition for Writ of Mandamus.

At the July 23, 1984 telephone pre-briefing conference in the Ninth Circuit, Dow Jones informed petitioners of its position that the mandate was effective immediately upon issuance of the order granting the petition for writ of mandamus. On August 15, 1984 Dow Jones reiterated its position that the 60-day period for review of the documents would expire on August 18, 1984 and the 70-day period for release of nonsensitive material would expire on August 28, 1984.

On August 23, 1984, the oil companies sought injunctive relief from the district court to prevent the release and publication of the documents. Dow Jones and the plaintiffs stipulated to an order that the stay remain in effect until further ruling from the district court. App. F-1 to F-3. Dow Jones cross-moved for immediate release of the documents. On September 6, 1984 the district court ruled that, even though the Ninth Circuit mandate had issued and been received at the district court, there was a possibility that the Ninth Circuit clerk had issued it by error. App. C-5. The district court, therefore, denied Dow Jones' motion for immediate release of the documents, but ordered that the 60-day review period commence to run on September 6, 1984. App. C-5 to C-6.

The result of the district court's September 6 ruling is that within 60 days—on or before November 5, 1984—the oil companies are to submit a list of those documents on file under seal that they claim contain trade secrets or commercially sensitive material. On the 70th day—November 15, 1984—documents for which petitioners do not claim continued protection are to be released, *unless* the Ninth Circuit rules otherwise.

There are currently pending before the Ninth Circuit the following motions filed by petitioners:

1. Petition for Rehearing and Suggestion of Rehearing En Banc, filed June 26, 1984;
2. Emergency Motion for Clarification of Jurisdiction, for Stay Pending Appeal and Petition for Relief Necessary and Appropriate in Aid of Appellate Jurisdiction, filed August 28, 1984;
3. Emergency Motion to Recall Mandate, filed September 11, 1984.

On September 25, 1984 petitioners filed in this Court their Petition for Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, their Motion to Accelerate Consideration of a Petition for Writ of Mandamus and an Application for Stay and Temporary Injunctive Relief in Aid of This Court's Appellate Jurisdiction. The Clerk advised counsel for Dow Jones & Company, Inc. that the response to the Application for Stay would be due on October 3, 1984 and that if Dow Jones wished to respond to the Petition for Writ of Mandamus and the Motion to Accelerate, its papers should be filed by October 5, 1984. Because we agree that prompt resolution is appropriate, Dow Jones & Company, Inc. has not filed a separate response to the Motion to Accelerate.

ARGUMENT

For more than two and a half years, Dow Jones has sought access to summary judgment documents filed under seal in the district court. For more than two and a half years, the petitioner oil companies have vigorously resisted such access. Their resistance is not based on a claim that the documents contain trade secrets. As to those, the district court has carefully provided continued protection. Nor is their resistance based on some other claim of privilege that would bar the public from reviewing the documents.

Petitioners' resistance to access is based solely on a claim that the time is not yet ripe for the public to understand the issues in this litigation. That right accrues, they argue, only *after* the district court issues a dispositive ruling. Accordingly, petitioners have stubbornly refused even to begin the process of reviewing the documents for commercially sensitive material, arguing that it is oppressive and burdensome to order them to do so.

On June 19, 1984 a panel of the Ninth Circuit Court of Appeals unanimously disagreed with petitioners. Ruling on Dow Jones' emergency petition for writ of mandamus, the appellate court vacated the district court's stay of its order granting access to the documents. App. A-1. Still, petitioners refused to begin the review process, arguing that by filing a petition for rehearing, they automatically stayed issuance of the Ninth Circuit's mandate. When they learned that the mandate had indeed issued, they appealed to the Ninth Circuit, twice setting deadlines by which, according to their own fiat, the appellate court should have acted. When the court failed to meet those deadlines, petitioners came to this Court seeking extraordinary relief that is neither warranted nor appropriate. In the course of doing so, they have seriously misrepresented not only the nature of the documents at issue in the case, but the actions of the Ninth Circuit. Because petitioners neither deserve nor require the extraordinary remedy of mandamus, the writ should be denied.

I

MANDAMUS IS NEITHER NECESSARY NOR APPROPRIATE

The extraordinary remedy of mandamus is unwarranted and inappropriate in the context of this case. Petitioners

have sought to inject a note of urgency and importance into these circumstances—and thereby capture the attention of this Court—by suggesting first, that the documents at issue here are mere discovery documents similar to those in *Seattle Times Co. v. Rhinehart*, — U.S. —, 104 S.Ct. 2199 (1984) and second, that unless this Court acts now, they will lose their rights on appeal. Neither claim is true.

A. The Documents At Issue Here Are Summary Judgment Papers, Not Mere Discovery Documents

Petitioners have seriously misrepresented to this Court the nature of the documents that will be disclosed on November 15 if the Ninth Circuit declines to act. They are not mere discovery documents exchanged secretly among the parties under the district court's protective order.[7] They are documents submitted to the district court, accompanied by a demand that the court adjudicate this case upon them.[8]

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[7]Petitioners imply, for example, that Dow Jones' request for "access to all protected discovery" was granted by the April 12 order. Pet. at 4-5. Dow Jones did originally seek access to all discovery, but it quickly narrowed its request to briefs and exhibits in support of or opposition to summary judgment, as well as plaintiffs' pretrial briefs, which served as responses to petitioners' summary judgment motions. It was this far narrower request, limited to adjudicative documents filed under seal with the court, that the district court granted. App. B-1 to B-2. On page 26 of their petition, petitioners again state: "The District Court's April 12 ruling holds that pretrial civil discovery is presumptively open to the public . . .". *See also*, Pet. at 25 (petitioners are threatened with disclosure of "confidential, private files that they have been compelled to disclose to adverse parties under the liberal federal discovery rules").

[8]The district court described the documents as follows:

> It is true, as the defendants point out, that most of the docket filings in MDL-150 have not been designated "Confidential." However, it also is true that what is sealed constitutes, overall, the most significant aspects of the litigation: how the plaintiffs

Denominating documents here in issue as "discovery material," as petitioners repeatedly do, is not helpful. A document obtained through discovery covered by a valid protective order may be a "raw fruit of discovery" (whether or not filed in court), or it may be submitted to the court as part of a substantive motion or in preparation for trial, or it may be presented at trial but excluded for evidentiary reasons, or it may be considered by a judge or jury and later become part of a record on appeal. In each case it is "discovery material" in the sense that it was surrendered during discovery under a protective order. But that does not aid in the inquiry as to whether it is subject to the presumption of public access and thus properly ordered unsealed.

Unlike mere discovery exchanged among the parties, documents obtained through discovery but employed in pretrial adjudication proceedings have uniformly been held to be subject to public access.* *See, e.g., In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1309 (7th Cir. 1984); *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983); *Joy v. North*, 692 F.2d

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intend to prove their cases and why they may or may not be able to show actionable wrongdoing. App. B-11.

*Thus, the cases on which petitioners principally rely have no bearing whatsoever on the issue at bar; they concern documents merely exchanged by the parties during discovery. *Seattle Times Co. v. Rhinehart*, ___ U.S. ___, 104 S.Ct. 2199 (1984); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980); *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979); *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963); *Times Newspapers Ltd. (Gr. Brit.) v. McDonnell Douglas Corp.*, 387 F.Supp. 189 (C.D. Cal. 1974).

880, 893-94 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983).

A vast difference exists between discovery documents and documents filed in support of or in opposition to motions for summary judgment. The former are in fact exchanged informally among the parties. They generally arrive in boxes, unindexed and unauthenticated. Many, if not most, are irrelevant or immaterial to the issues in the case.

By contrast, documents filed in support of or in opposition to summary judgment should be both relevant and otherwise admissible. Fed.R.Civ.P. 56(e). They constitute the core of each party's case and represent counsels' best efforts to present their evidence in written form. They are the result of the winnowing process that occurs *after* discovery as the parties prepare and submit their case for adjudication. These are the documents on which each side relies to prove its case. They are court documents, *presented for judicial action*, with counsels' implicit representation that they constitute relevant, material, admissible evidence.

B. Petitioners' Interests Will Be Adequately Preserved Through The Ordinary Course of Appeal

There currently are pending in the Ninth Circuit three proceedings which directly address the issues that the oil companies ask this Court to resolve by way of extraordinary writ of mandamus:

1. The oil companies' petition for rehearing from the June 19, 1984 Order of the Ninth Circuit granting Dow Jones' petition for mandamus and vacating the April 12, 1984 stay;

2. The oil companies' motion for clarification dated August 27, 1984; and

3. The oil companies' September 10, 1984 motion to withdraw the mandate.

Each of these proceedings may afford the oil companies the relief they seek here. Moreover, if, after the Ninth Circuit rules, the oil companies remain unsatisfied, they may then properly petition for certiorari in this Court. *Will v. United States*, 389 U.S. 90, 94-95 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251 (1957). Thus ordinary appellate procedures, if followed, will provide ample opportunity to correct any error in the Circuit Court.[10]

Under these circumstances, mandamus is utterly unnecessary and would be highly inappropriate. Rule 26 of the Supreme Court Rules, setting forth the considerations governing issuance of extraordinary writs, expressly provides that "[t]o justify the granting of any writ under [28 U.S.C. § 1651(a)], it must be shown . . . that adequate relief cannot be had in any other form or from any other court." *See also, In re Chicago, Rock Island & P.R. Co.*, 255 U.S. 273, 275-76 (1921); *Matter of Tiffany*, 252 U.S. 32, 37 (1920); *Alexander v. Crollott*, 199 U.S. 580 (1905). It is well settled that the writ of mandamus is not to be used as a substitute for appeal. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). The writ "should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). This rule comports with the general principle governing mandamus proceedings that "whatever can be done without the employment of that extraordinary writ, may not be done with it." *Helstoski v.*

[10]Respondent, of course, does not believe that the Ninth Circuit has erred.

Meanor, 442 U.S. 500, 505 (1979) (emphasis deleted), *quoting Ex parte Rowland,* 104 U.S. 604, 617 (1882).

It is not unusual for courts, at least initially, to refuse mandamus when proceedings still pending in the court below might resolve the issue. The Ninth Circuit did exactly that when it first considered this case in September, 1983. Supp. App. G. *See also, Merritt-Chapman & Scott Corp. v. Kent,* 309 F.2d 891, 891-92 (6th Cir. 1962), *cert. dismissed,* 372 U.S. 982 (1963). *Cf., De Beers Consolidated Mines v. United States,* 325 U.S. 212, 217 (1945) (Court found it unnecessary to consider those issues that were still pending in the court below).

The oil companies' claim that a refusal by this Court to issue mandamus will cause them inconvenience and expense is exaggerated and does not justify substituting mandamus for the ordinary course of appeal. Their claim that they face disclosure "of confidential, private files" (Pet. at 25) is quite simply false.

First, it is well-established that the inconvenience and expense that a party suffers as a result of pursuing the normal course of an appeal will not justify issuance of a writ of mandamus. *Schlagenhauf v. Holder, supra,* 379 U.S. at 110; *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953); *Ex parte Fahey, supra,* 332 U.S. at 260. *See also, Plekowski v. Ralston-Purina Co.,* 557 F.2d 1218, 1220 (5th Cir. 1977); *In re Estelle,* 516 F.2d 480, 484 (5th Cir. 1975), *cert. denied,* 426 U.S. 925 (1976).

Second, the oil companies will not, in fact, suffer any undue burden or expense. These documents represent the core of each side's case submitted to the court for adjudication on summary judgment. Counsel must already be intimately familiar with them.

At least some of the oil companies have already reviewed the documents for confidential business information in connection with a motion for access to documents filed by the State of Alaska in MDL-150.[11] Moreover, under the May 1974 protective order the oil companies already should have, but apparently have not, reviewed these documents for confidentiality. The protective order, by its terms, was designed to protect "confidential trade secrets and information of commercial significance to competitors" under Rule 26(c) of the Federal Rules of Civil Procedure. App. B-7. It should never have been used as petitioners did here, to stamp confidential virtually every document in the case, including summary judgment motions, news releases and even copies of federal regulations.[12]

The documents to be released pursuant to the vacation of stay are, by petitioners' own admission, not trade secrets and therefore not subject to any protection whatsoever. That is, the district court's order requires that within 60 days petitioners cull out those documents that they believe are commercially sensitive and submit them to the court. The remainder are, by definition, not even allegedly commercially sensitive. There is absolutely no reason to stay release of documents that petitioners admit are not prop-

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[11]Opposition of Plaintiffs City of Long Beach and State of California, Real Parties in Interest, to Emergency Motion to Recall Mandate and Petition for Clarification of Mandate (filed in the Ninth Circuit September 19, 1984) at 5-6, attached as Supplemental Appendix H hereto.

[12]As the district court said:

> At this juncture, it is clear that some of the sealed information never would have qualified for protection under the terms of P.T.O. No. 2 or Rule 26(c)(7). It is quite likely that most of the other sealed documents have lost their character as commercially sensitive due to the passage of time. App. B-12.

erly covered by the protective order. If the documents do not even meet the requirements of Rule 26(c), they do not belong under seal in court files.

Thus, the only injury petitioners conceivably could suffer, in the remote event that the Ninth Circuit fails to act, is limited to the issue of timing of release of the documents. Petitioners have conceded before the Ninth Circuit that the public is entitled to access to these documents following a dispositive ruling in the district court.[13] They merely argue that access now, while summary judgment motions are pending, is premature.[14] We demonstrate below why petitioners are unlikely to succeed on the merits of their argument on appeal. For purposes here, the issue of whether petitioners' limited appeal is worth preserving—when to do so would irretrievably deny to the press and public their right of contemporaneous access to court proceedings—is one best left to the Ninth Circuit Court of Appeals.

II

THE NINTH CIRCUIT NEITHER ACTED EX PARTE NOR ABUSED ITS DISCRETION IN VACATING THE STAY

Petitioners argue that the Ninth Circuit not only exceeded its authority and abused its discretion in vacating the stay, but that it did so *ex parte*. The first two claims are wrong as a matter of law. The last claim is wrong as a matter of fact.

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[13] *In Re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation* (No. 84-5878), Brief of Appellants at 8, 15, 19, 40.

[14] As to some of the documents, petitioners cannot make even this argument. The district court has already ruled on two motions for summary judgment, but the briefs and supporting documents remain under seal. Supp. App. I & J.

A. The Petitioners Were Given Ample Opportunity to Be Heard In the Ninth Circuit

Petitioners filed in the Ninth Circuit no fewer than seven separate briefs on the issue of whether the district court's stay pending appeal should be vacated. The fact that petitioners' briefs may have been filed in different dockets from the petition for writ of mandamus is of absolutely no consequence. Uncertain of the basis for appellate jurisdiction and because the district court itself had recommended three different methods of obtaining review, Dow Jones had filed a notice of appeal and a petition for permission to appeal under 28 U.S.C. § 1292(b). Dow Jones' application to vacate the stay—filed in the appeal docket—was styled, in the alternative, as an emergency petition for writ of mandamus. Although the petition for mandamus was assigned a separate docket number in the Ninth Circuit, each of the dockets addressed the same issue: whether the stay pending appeal should be vacated. The *same panel* ruled *on the same day* on each of the three dockets, granting the petition for writ of mandamus, denying the petition for permission to appeal, and dismissing Dow Jones' appeal of that portion of the district court's decision staying disclosure pending appeal. App. A-1, D-1, E-1.

The Ninth Circuit even granted petitioners an extension of time in which to respond to Dow Jones' efforts to vacate the stay. On April 26, 1984 the oil companies moved for an extension of time in which to respond to Dow Jones' application to vacate stay. On May 3, 1984, the Ninth Circuit granted the motion, allowing petitioners until May 14, 1984 to respond.

Petitioners' argument that they were entitled to oral argument on the Ninth Circuit mandamus petition is as spe-

cious as their claim that they were denied an opportunity to respond. Neither the Constitution of the United States, the Federal Rules of Appellate Procedure nor the Ninth Circuit Local Rules require oral argument on a petition for writ of mandamus, as this Court's own practice of summary reversal on petitions for certiorari demonstrates. *Federal Communications Com. v. Station WJR,* 337 U.S. 265, 274-83 (1949) ("Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised."); *George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.,* 502 F.2d 1045, 1050-51 (5th Cir. 1974) (constitutional; "Oral argument is not always helpful, nor is it the *sine qua non* of fair dispositions."); *Groendyke Transport, Inc. v. Davis,* 406 F.2d 1158, 1162-63 (5th Cir.), *cert. denied,* 394 U.S. 1012 (1969); *Magnesium Casting Co. v. Hoban,* 401 F.2d 516, 518 (1st Cir. 1968), *cert. denied,* 393 U.S. 1065 (1969). *See also,* Supreme Court Rule 27 (Court *may* order argument on application for extraordinary writ).

In *N.L.R.B. v. Local No. 42, Int. Ass'n of Heat & F. I. & A. Workers,* 476 F.2d 275 (3d Cir. 1973), the Third Circuit specifically held that Rule 34, Fed.R.App.P., does not require oral argument in every case:

> Such a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision making process. 476 F.2d at 276.

Flexibility is particularly critical where, as in the case at bar, time is of the essence, "important public policy issues are involved", and the case is one "where rights delayed

are rights denied." *Groendyke Transport, Inc. v. Davis, supra,* 406 F.2d at 1162.

B. The Ninth Circuit Did Not Exceed Its Jurisdiction In Vacating the Stay

The oil companies suggest that mandamus is appropriate here because the Ninth Circuit exceeded its jurisdiction. Vacating the district court's stay, they argue, was not an act in aid of appellate jurisdiction and, therefore, was not within the Circuit Court's power under 28 U.S.C. § 1651(a). Pet. at 2, 16, 22. This construction of the Circuit Court's mandamus power is unprecedented[15] and plainly wrong. The propriety of the Ninth Circuit's decision is solely a matter of discretion. That court clearly had jurisdiction to act. *Schlagenhauf v. Holder, supra,* 379 U.S. at 111 n.8 ("The issuance of this extraordinary writ is itself generally a matter of discretion."). *Accord, Helstoski v. Meanor, supra,* 442 U.S. at 506; *Kerr v. United States District Court,* 426 U.S. 394, 403 (1976). "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." *La Buy v. Howes Leather Co., supra,* 352 U.S. at 254-55. *See also, In re United States,* 348 F.2d 624, 625 (1st Cir. 1965). *Cf., United States v. Bondey,* 171 F.2d 642 (2d Cir. 1948) (per curiam) (mandamus denied in a criminal case because the Court of Appeals would not at any point have obtained appellate jurisdiction over the issue). The oil companies concede that the Ninth Circuit had authority to vacate the stay in conjunction with its appellate review of the district court's April 12 disclosure order. Pet. at 21.

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[15]The oil companies do not attempt to support their interpretation with precedent.

It therefore had authority under 28 U.S.C. § 1651 to issue mandamus.

The Ninth Circuit acted within the scope of its authority even under the oil companies' unprecedented interpretation of the phrase "in aid of jurisdiction" in § 1651. Only by granting this preliminary relief could the Ninth Circuit preserve Dow Jones' and the public's clear and substantial interest in prompt and contemporaneous access.

The oil companies are also wrong in contending that the Ninth Circuit abused its discretion. To the contrary, the Ninth Circuit's order was entirely proper to preserve Dow Jones' right to contemporaneous access, to correct a district court decision that was clearly erroneous, and to address the district court's continued denial and delay of access over a two-year period.

The right to contemporaneous access was and is particularly urgent because the district court was proceeding to rule on summary judgment motions.[16] These decisions of the district court, dealing with the very heart of the *Long Beach* case, are based on secret documents that the district court in its April 12 decision held are presumptively public but refused to release pending appeal in the Ninth Circuit.

Mandamus was also proper to correct the district court's clear error and abuse of discretion in applying the standards for a stay pending appeal.[17] A stay of proceedings

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[16]The district court has since decided two motions for summary judgment in the *Long Beach* case. Supp. App. I & J.

[17]The oil companies argue that a district court order entering a stay pending appeal "could rarely, if ever" be subject to mandamus because entry of a stay is an exercise of discretion. Pet. at 20-21. The authorities that they cite do not support this proposition. Neither *Will v. United States*, 389 U.S. 90 (1967) nor *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) nor *Allied Chemical*

pending interlocutory appeal is the exception, not the rule. *Fitzgerald v. Compania Noviera La Molinera*, 394 F.Supp. 402, 412 (E.D. La. 1974) (motion to certify appeal denied January 15, 1975). *See also, Brotherhood of Railway & S. S. Clerks, etc. v. National Mediation Board*, 374 F.2d 269, 275 (D.C. Cir. 1966).[18] Such orders are by no means insulated from appellate review.

Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) involved a stay pending appeal. In *Becker v. United States*, 451 U.S. 1306, 1312 (1981), Justice Rehnquist, acting as Circuit Justice, entered a stay despite the fact that both the district court and the Court of Appeals had denied applications for a stay. In *Matter of Combined Reduction Co.*, 557 F.2d 179, 193 (9th Cir. 1977), the Ninth Circuit found no abuse of discretion and noted that because there was no record of appeal from denial of a stay, it could not properly consider the matter. In *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922), the Court expressly recognized that although the court that has considered a case on the merits is generally in a better position to assess the propriety of a stay, reconsideration by a higher court is in some cases desirable. Here, of course, due to the history of the litigation, the Ninth Circuit panel that vacated the stay was already familiar with the merits of the case.

[18]Petitioners assert that stays pending appeal have been entered under similar circumstances. Pet. at 22. The cases cited to support that assertion do not sustain it. *United States v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982) involved a criminal defendant's interlocutory appeal of the denial of his suppression motion under the Fourth Amendment. There is no indication in the opinion that a stay was either sought or discussed, though presumably the material sought to be excluded was not introduced at trial while the appeal was pending. The documents that were sealed pending appeal in *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980), were sealed on the urging of *all* parties. 616 F.2d at 460. While a stay pending appeal was entered in *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1307 n.8 (7th Cir. 1984), nothing in the Court of Appeals' opinion indicates whether the stay was entered over the objection of one or more of the interested parties. In both *Providence Journal v. F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979) and *Antonelli v. F.B.I.*, 553 F.Supp. 19, 25 (N.D. Ill.

While the standard of review of a stay pending appeal is sometimes said to be whether the district court abused its discretion, *Washington Metropolitan Area Transit Commission v. Holiday Tours,* 559 F.2d 841, 845 (D.C. Cir. 1977), the actual review entails a detailed analysis of the factors relevant to determining whether a stay is appropriate in the first instance. *In re Letters Rogatory from the Tokyo District,* 539 F.2d 1216, 1220 (9th Cir. 1976); *United States v. First National Bank of Black Hills,* 619 F.2d 774 (8th Cir. 1980). Those factors are:

> (1) Has [the party seeking the stay] made a strong showing that it is likely to prevail on the merits of its appeal? . . .
>
> (2) Has the [party seeking the stay] shown that without such relief, it will be irreparably injured? . . .
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .
>
> (4) Where lies the public interest?
>
> *Washington Metropolitan Area Transit Commission v. Holiday Tours, supra,* 559 F.2d at 843, *quoting Virginia Petroleum Jobbers Ass'n v. F.P.C.,* 259 F.2d 921, 925 (D.C. Cir. 1958).

The case law generally requires a strong showing that the appellant is likely to prevail on the merits. *See, Washington Metropolitan Area Transit Commission v. Holiday Tours, supra,* 559 F.2d at 843; *Warm Springs Dam Task Force v. Gribble,* 565 F.2d 549, 551 (9th Cir. 1977) (standard applied re injunction pending appeal). The required showing is reduced to that of "a substantial case on the

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1982), *cert. denied,* ___ U.S. ___, 104 S.Ct. 2399 (1984), the defendants demonstrated a likelihood of success on appeal and the stays were premised on specific findings that denying a stay would irreparably harm the defendants while granting it would only minimally harm the plaintiffs.

merits" or "serious legal questions presented" only when all the other factors strongly favor a stay. *McSurely v. McClellan,* 697 F.2d 309, 317 (D.C. Cir. 1982); *Providence Journal v. F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979). And where the right vindicated by the district court's order is of paramount constitutional significance, the burden on the party supporting the stay is increased. *Evans v. Buchanan,* 455 F.Supp. 705, 708 (D.Del. 1978). *Cf., Florida Businessmen for Free Enterprise v. City of Hollywood,* 648 F.2d 956, 958 (5th Cir. 1981) (irreparable injury to party seeking stay where First Amendment freedoms lost).

As we demonstrate below, petitioners have very little likelihood of prevailing on the merits, and as discussed above, far from being irreparably injured, they risk only disclosure of documents that could never have met the test of Fed. R. Civ. Pro. 26(c). Finally, the public interest demands access to documents in this case that has been litigated for ten years by public officials on the public behalf. The Ninth Circuit properly considered and corrected the district court's clear error in assessing these factors.

C. Petitioners Are Not Likely to Succeed on the Merits of Their Appeal

Petitioners argue that they are entitled to a stay pending appeal—while the antitrust action continues and summary judgment motions are heard—because they are likely to succeed on the merits. They argue that the district court's April 12 decision is "vulnerable" for three reasons:

1. Because it is not supported by case law;

2. Because contemporaneous access to court documents, prior to a dispositive ruling, does nothing to promote the purpose of the public access right, which is to monitor judicial performance;

3. Because the ruling "effectively nullifies" umbrella protective orders. Pet. at 27.

We address each of these arguments briefly below.

1. The case law fully supports the April 12 decision

Petitioners do not dispute, nor can they, that the public is entitled to access to court proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court of California*, — U.S. —, 104 S.Ct. 819, 828 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The issue as joined in the Ninth Circuit is solely whether the right of access arises at the adjudicative stage of civil litigation or only when, if ever, adjudication is complete.

The district court's ruling that the right of access arises at the adjudicative stage is amply supported by the case law. Indeed, every case in which the issue was considered (including one decided after the district court ruled) has, like the court below, emphasized the need for "contemporaneity." The Seventh Circuit recently stated in a civil proceeding, for example:

> [T]he presumption of access normally involves a right of *contemporaneous* access: disclosure of the contents of the Report [to which access was sought] would have been proper at the time the motion [to dismiss] was still pending [*i.e.*, prior to decision].
>
> *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1310 (7th Cir. 1984) (emphasis in original, citations omitted).

See also, Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179-80 (6th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 1595 (1984) (civil proceeding); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan,

J., concurring); *In re Oliver*, 333 U.S. 257, 270 (1948); *In re Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983) (civil proceeding); *Associated Press v. United States District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983).

The only cases cited by petitioners (*see* Pet. at 27 n. 37) that even begin to address the conclusion of the district court are an opinion of the District of Columbia Court of Appeals, which was vacated and remanded,[19] and dicta from a case in the Eastern District of Pennsylvania.[20] The overwhelming weight of the case law supports the April 12 decision.

Nor does *Seattle Times v. Rhinehart*, — U.S. —, 104 S.Ct. 2199 (1984), weaken the district court's opinion, as petitioners suggest. *Seattle Times* dealt solely with whether a party may disseminate documents obtained in pretrial discovery, but never filed with the court. Nowhere did the Court hold or suggest that common law rights of access are nonexistent prior to trial or dispositive ruling, as petitioners claim. Rather, the Court simply said that

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[19] *Tavoulareas v. The Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984).

[20] *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F.Supp. 866 (E.D. Pa. 1981). Petitioners state that the district court acknowledged three contrary cases—*Tavoulareas* and *Zenith*, *supra*, and *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980). The district court's opinion contains no such acknowledgment regarding *Wilk*, and *Wilk* itself granted access to a collateral litigant to pretrial discovery materials. The case had nothing to do with documents filed under seal with a court. In any event, if *Wilk* is read to suggest that contemporaneous access is not required, to that extent it has been overruled in *In re Continental Illinois Securities Litigation*, *supra*, 732 F.2d at 1310.

"restraints placed on discovered, but not yet admitted, information are not a restriction on a *traditionally public source of informaton.*" 104 S.Ct. at 2208 (emphasis added). Court files, on the other hand, are a "traditionally public source of information," particularly when they contain motions for summary judgment and supporting documents that will form the basis for dispositive rulings in cases of major public concern. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *In re Oliver, supra*, 333 U.S. at 270 n. 24; *United States v. Criden, supra*, 648 F.2d at 819; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964); *In re Chambers*, 44 Fed. 786 (1891).

2. The policies behind public access require access at the adjudicative stage of court proceedings

Petitioners argue that since "the undisputed purpose of the public access right is to allow monitoring of judicial performance," there is no logic in extending public access to court documents until they are the subject of a dispositive judicial ruling. Pet. at 27. Both Dow Jones and the district court dispute the assertion that the sole purpose behind the right of access is to monitor judicial performance. As the district court pointed out, "[t]he rationale for public access is especially apropos . . . when the plaintiffs' lawyers are public officials." App. B-10. And there exist other important policy reasons for the right of access, such as the need for an outlet for community concern and the fact that open courts promote true and accurate factfinding. *Brown & Williamson Tobacco Corp. v. F.T.C., supra*, 710 F.2d at 1178 and cases cited therein.

But even if the need to monitor judicial performance were the sole reason for the right of access, that need—par-

ticularly in *this* case—cannot be served without contemporaneous access at the adjudicative stage. It is during such proceedings that the public most needs to be able to "watch and participate." *Id.* at 1179. The case has gone on for over ten years. The very length of time it has taken to adjudicate the matter is cause for public concern. But without access to the documents and to the briefs that explicate the issues, the public cannot assess whether the time that has elapsed thus far is justified or not. In this case, the *absence* of a dispositive ruling is an aspect of judicial performance that the public is entitled to monitor and to understand.

3. Access at the adjudicative stage in no way jeopardizes the usefulness of umbrella protective orders

Finally, petitioners argue that the district court's ruling will be the death-knell of umbrella protective orders in complex litigation. Pet. at 27-28. The ruling, however, does nothing to protective orders or their usefulness during discovery. It simply holds that when the case reaches the adjudicative stage, the review process must begin, something that petitioners are apparently loathe to do. A protective order denying public access to discovery proceedings may only issue for "compelling reasons." *American Telephone and Telegraph Co. v. Grady,* 594 F.2d 594, 596 (7th Cir.), *cert. denied,* 440 U.S. 971 (1979). In antitrust litigation, those reasons will normally have to do with trade secrets or commercially sensitive material, as they did here.[21] The district court has provided a process whereby such material will be protected. All that the district court's order requires petitioners to do is to review the material and separate it

[21]The original protective order in the antitrust case was entered at petitioners' request in order "to prevent the imminent public exposure of . . . confidential trade secrets and information of commercial significance to competitors." App. B-7.

into two categories: commercially sensitive and commercially nonsensitive. It is a task petitioners must do sometime before trial, unless they intend to request an order sealing every exhibit at trial.[22]

Petitioners' likelihood of success on the merits is slim indeed. It is certainly no excuse for interminable delay of the public's ability to monitor these proceedings.

III

FILING OF A PETITION FOR REHEARING DOES NOT AUTOMATICALLY STAY ISSUANCE OF A WRIT OF MANDATE

Petitioners argue that the Ninth Circuit mandate was issued in violation of Fed.R.App.P. 41(a). Pet. at 16-19. Under that rule, they argue, filing of their petition for rehearing should have automatically stayed issuance of the mandate. Pet. at 16-17.

Rule 41(a) reads in pertinent part as follows:

> The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. . . . The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. . . .

Rule 41 is not applicable here for two reasons: first, because it governs appeals and not mandamus, and second, because it applies only to a final judgment, not interim orders of the type at issue here.

A comparison of the appeals process with the process for mandamus demonstrates that Rule 41 does not apply to petitions for writs of mandamus. The 21-day period be-

[22]The order does *not* require petitioners to review every document produced in discovery, but only those attached as exhibits to the motions for summary judgment and pretrial briefs on file with the court. App. B-1 to B-2.

tween entry of judgment and issuance of mandate contained in Rule 41 makes perfect sense on appeal, but it is utterly unworkable in the context of an emergency petition for writ of mandamus. On an appeal, the automatic 21-day period allows both sides time to decide whether to file a petition for rehearing, seek certiorari in the Supreme Court, or simply let the matter end. If either party files a petition for rehearing, issuance of the mandate is automatically stayed pursuant to Rule 41. But emergency mandamus proceedings by definition require expedited review. They cannot afford the 21-day grace period allotted to an appeal. Mandamus is an extraordinary remedy, to be used only in the most egregious and compelling circumstances. *See, Sacramento Bee v. United States District Court,* 656 F.2d 477, 480-81 (9th Cir. 1981), *cert. denied,* 456 U.S. 983 (1982). *Any* delay in the issuance of the court's mandate may cause irreparable harm to the prevailing party's rights. This is particularly so when those rights are grounded, as they are here, in the First Amendment. *See, e.g., Newman v. Graddick,* 696 F.2d 796, 799 (11th Cir. 1983).

Petitioners argue also that because Rule 41 appears under the title "General Provisions," it applies to all proceedings—emergency or otherwise—and that special proceedings not subject to the general provisions bear their own titles. Pet. at 17 n.19. But as petitioners themselves note, writs of mandamus and prohibition bear their own title—"Title V. Extraordinary Writs"—and receive special treatment under the Rules of Appellate Procedure. Rule 21 recognizes the need for speed in such cases by giving writ proceedings precedence over civil cases. It would be anomalous indeed for the court, once it granted such a writ on an emergency basis, to assume that its mandate will automatically be stayed for 21 days.

In cases in which time is of the essence, both the Ninth Circuit and other Courts of Appeals grant writs of mandamus without specifying when the mandate shall issue. *United States v. Harper*, 729 F.2d 1216, 1217, 1226 (9th Cir. 1984) (in case set for trial "a few weeks hence," writ directed to district court "should issue"); *In re Greensboro News Co.*, 727 F.2d 1320, 1322, 1326 (4th Cir. 1984), *petition for cert. filed*, 52 U.S.L.W. 3908 (U.S. June 4, 1984) (No. 83-1995) (stay of closed *voir dire* proceedings to consider press access claim implicitly vacated immediately upon issuance of order denying claim); *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977) (district court stay of proceedings vacated; district court ordered to proceed "as expeditiously as possible"); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006-09 (3d Cir. 1976) (district court protective order vacated on First Amendment grounds); *Local 391, International Bro. of Teamsters, Etc. v. Ward*, 501 F.2d 456, 459 (4th Cir. 1974) (issuing writ of mandamus "directing respondent [court] forthwith to hear and determine" pending motions).[23]

Petitioners argue that application of Rule 41 to writs of mandamus is necessary to preserve their right to petition for rehearing or certiorari. Pet. at 17. At the same time, however, they acknowledge that "[a] court of appeals is

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[23]Even on appeal, the 21-day stay of mandate does not necessarily mean that a stay pending appeal automatically remains in effect until issuance of the mandate. In *American Telephone and Telegraph Co. v. Grady, supra*, 594 F.2d at 597, the Court of Appeals affirmed a district court's modification of a protective order similar to the one at issue here, but specifically stated that "the stay order by this Court pending the disposition of the appeal shall remain in effect until the mandate issues."

free to dispense with the . . . automatic stay pending disposition of a petition for rehearing," provided it so states in an order. Pet. at 18. If that is true, as it unquestionably is under Rule 41(a), then it makes no difference whether the court expressly orders that the mandate issue immediately or assumes that it shall do so under the established practice in that circuit. The losing party's petition for rehearing or certiorari is equally preempted by immediate issuance of the mandate.

Finally it is clear, as even petitioners admit, that Rule 41 applies only to final judgments and not to interim orders. Because the Ninth Circuit order was an order vacating a stay pending appeal, it cannot be viewed as the kind of final judgment to which Rule 41 applies. The order in no way resolves the issue of public access to these documents. It simply orders the district court to set in motion a schedule for review of those documents. In that sense, the order is much more like the interim order issued in *York Intern. Building v. Chaney,* 527 F.2d 1061 (9th Cir. 1975), in which the Ninth Circuit said:

> Additionally, our February 25th Memorandum was in response to a motion and so was not a "judgment" under Rule 41, FRAP. As such, it took effect immediately upon being filed in this court and did not become subject to any stay of mandate or similar abeyance. The "judgment" mentioned in Rules 37 and 41, FRAP, is obviously the final judgment on appeal, not an intermediate order, such as we entered on February 25th. 527 F.2d at 1066.

Had petitioners desired a stay pending resolution of their petition for rehearing they should have asked for one at the time rather than relying on their own interpretation of the Federal Rules of Appellate Procedure. The order

in the instant case was admirably suited to such a request. It merely set in motion a schedule of events, the first of which would not occur for 60 days. Petitioners had ample time to move for a stay or to seek clarification of the Ninth Circuit order granting mandamus. They chose not to, and so bought themselves what they perenially appear to be seeking throughout these proceedings: a bit more time. Instead of beginning the document review process on June 19, 1984, when the Ninth Circuit issued its order, they waited. Now that they have been told that their time began to run on September 6, 1984—nearly two and a half months later—they come to this Court complaining that they have been denied rights to which they were never entitled in the first place.

CONCLUSION

The writ should be denied.

Dated: October 5, 1984

Respectfully submitted,

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Supplemental Appendix G

United States Court of Appeals

For the Ninth Circuit

No. 83-7634
MDL# 150 WPG
Central California
Dow Jones & Company, Inc.,
Petitioner,

vs.

United States District Court for the
Central District of California,
Respondent,
and
State of Arizona, State of California, et al.,
Real Parties in Interest
Before: SNEED and POOLE, Circuit Judges

Filed September 15, 1983

ORDER

Dow Jones & Co., Inc., intervenor below, petitions for a writ of mandamus directing the district court to rule on its motions for access to pretrial statements, briefs, and summary judgment motions, responses and exhibits in *In re: Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL Docket No. 150.*

The petition for writ of mandamus is denied without prejudice to renewal if no ruling has been made by the

district court before the hearings on defendants' motions for summary judgment or, in any event, by October 31, 1983.

The motion of McClatchy Newspapers for leave to file a brief as amicus curiae is granted. The brief submitted is ordered filed.

If the petition for a writ of mandamus is renewed, McClatchy Newspapers may also file a brief as amicus curiae.

Supplemental Appendix H

In the United States Court of Appeals

For the Ninth Circuit

Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation
MDL 150-WPG (E.D. Cal.)

No. 84-5878
Mobil Oil Corp., Atlantic Richfield Co., *et al.*, Appellants,

v.

Dow Jones & Co., Inc., State of California, *et al.*, Appellees.
On Interlocutory Appeal From An Order Of The United States District Court For The Central District of California

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No. 84-7262
Dow Jones & Co., Inc., Petitioner,

v.

United States District Court for the Central District of California, Respondent,
and
Mobil Oil Corporation, *et al.*, Real Parties in Interest.

On Petition For Writ of Mandamus
Opposition of Plaintiffs City of Long Beach and State of California, Real Parties in Interest, To Emergency Motion to Recall Mandate
and
Petition for Clarification of Mandate

Plaintiffs, the City of Long Beach and the State of California, real parties in interest, hereby move this Court for permission to intervene to file a brief in opposition to Defendants' Mobil Oil Co. et al., Emergency Petition To Recall The Mandate and Supplemental Memorandum In Support of Emergency Motion Of Defendants Below For Clarification Of Jurisdiction, For Stay Pending Appeal, and Petition For Relief Necessary And Appropriate In Aid Of Appellate Jurisdiction, Pursuant to 28 U.S.C. §§ 1651.

Plaintiffs' motion to intervene is brought on the ground that only plaintiffs are in a position to correct certain of defendants' misstatements to this Court. Dow Jones the intervenor is unable to refute certain misstatements of defendants because it does not have access to pleadings and documents filed in this case. Plaintiffs' motion to intervene is brought on the additional ground that plaintiffs have an interest in the outcome of the motion. Under the district court order which is the subject matter of the mandate at issue in defendants' motion, plaintiffs must deliver to non-parties a copy of any documents cited in plaintiffs' briefs that were produced by such non-parties.

Plaintiffs also move this Court for clarification concerning this Court's mandamus issued on June 19, 1984. Without such clarification, plaintiffs are faced with irreconcilable orders of the District Court. On the one hand, a protective order has been entered since the start of MDL-150 which forbids the dissemination of documents produced in discovery. On the other hand, this Court's mandamus appears to have vacated a stay of the District Court's order which order both declassified certain documents and required plaintiffs to turn over certain documents to Dow

Jones. The complicating factor is that the District Court's order provided for a 60 day period for defendants to designate documents which they believed to be deserving of specal protection and a 70 day period after which documents not so designated in the 60 day period would be turned over to Dow Jones. If the mandamus of this Court was effective June 19, 1984, as plaintiffs maintain, then both the 60 and 70 day periods have already run. Because defendants did not designate any documents for further protection, plaintiffs believe that they are required to turn over to Dow Jones all of defendants documents subject to the Order forthwith. Defendants maintain that the 60 day and 70 day periods did not begin on June 19, 1984 and that the periods have not run. Only this Court can decide when the mandamus was effective and thus when the 60 day and 70 day periods began to run, plaintiffs need this Court to clarify whether Plaintiffs now have a duty to turn over documents to Dow Jones.

I.

DEFENDANTS' REVIEW OF DOCUMENTS WILL NOT BE LABORIOUS AND EXPENSIVE

Plaintiffs wish to bring to this Court's attention several facts—facts which are not available to intervenor Dow Jones—that refute defendants' argument that this Court should recall its mandate on the ground that the review of documents is "laborious and expensive." Defendants' Brief at 11. Without presenting this Court any reasons whatsoever, defendants contend that certain defendants cannot complete review of their documents in less than 60 days. Defendants' Brief at 12. In actual fact, the review process is not burdensome to defendants for the following reasons:

(1) The documents under discussion are limited mostly to those listed in plaintiffs' pretrial briefs. The documents listed in the pretrial briefs formed the universe out of which all subsequent summary judgment motions were based. The pretrial brief submitted by the City of Long Beach referred to less than 1400 documents. A number of these were third party documents or documents publicly available. On average, each defendant would have less than 200 documents used by Long Beach to review. The combined total for defendant documents cited by plaintiffs in the States' cases is less than 3400. Of these, over one thousand are "no bid" letters in which defendants declined to submit bids to public entities. In addition, a number of the remaining documents were third party documents and public record documents including Platts Oilgram and testimony before Congressional committees.

(2) The documents referred to in plaintiffs' pretrial briefs are already very familiar to defendants. Long Beach's pretrial brief was filed in June 1982 and summary judgment motions based on defendants documents cited in the pretrial brief were filed in December 1982. Plaintiffs filed their pretrial brief in the States' cases in January 1983 and two additional supplements, one in June 1983 and another in May of 1984. Again, these documents were subsequently cited in summary judgment motions.

(3) Defendants' argument falsely assumes that there are business justifications for protecting certain of their documents. In actual fact, the likelihood that there are any documents deserving of protection is exceedingly remote. Not one of defendants' documents cited by Long Beach was written after December 31, 1976. Fully one half of the doc-

uments were written in the 1960's and many are over twenty years old. Many of the defendants' documents contain damning admissions of their underpricing of California crude oil and of their conspiracy to effectuate their conspiracy through the device of trading crude oil which they called a "three-cut exchange." But none of this bears on business reasons for preserving confidentiality. The real reason why defendants want to keep Dow Jones from obtaining access to their documents is their fear of public condemnation of their illegal acts.

(4) The defendants' attempts to pretend that their documents contain sensitive business information that should be protected fails when one considers the fact that only they are their competitors in California and they already have each other's documents produced in MDL-150. The last effective competition to these seven defendants disappeared when Gulf and Getty were bought out by Socal and Texaco respectively. Thus there does not exist any company in competition with defendants which does not already possess the documents at issue. Defendants' purported need to maintain confidentiality is absurd.

(5) At least some of the defendants reviewed their documents for confidential business information in connection with a motion for access to documents filed by the State of Alaska. The State of Alaska sought and obtained access to documents filed in MDL-150: As in the present situation, the District Court granted defendants the opportunity to review their documents and submit a list of those documents which they regarded as particularly sensitive. Mobil Oil Co., the primary moving party here, submitted such a list to the District Court. After reviewing the documents

in camera, the District Court shielded some of those documents from discovery by the State of Alaska. The District Court's decision is attached as Exhibit A. Having completed this procedure already, Mobil cannot now complain about the burden it would have to endure to review documents.

(6) As plaintiffs will argue below, the mandate of this Court vacating a stay of the District Court's Order was issued and effective on June 19, 1984. Under the District Court's Order defendants had only 60 days to designate those documents which they wanted to protect. The District Court's Order is attached as Exhibit B. Because that 60 day period has already run, the defendants cannot now seek protection for any of their documents. Accordingly, defendants now have no reason to undertake a review of their documents.

II.

THIS COURT'S MANDATE WAS EFFECTIVE ON JUNE 19, 1984 AND HENCE, PLAINTIFFS MUST IMMEDIATELY HAND OVER TO DOW JONES THOSE DOCUMENTS WHICH WERE SUBJECT TO THE DISTRICT COURT'S ORDER

Plaintiffs seek a determination by this Court that indeed its mandate was issued and hence effective on June 19, 1984 and that, thus, the 60 day period in which defendants were required by the District Court to submit a list of documents for special protection has run and the 70 day period for handing non-designated documents to Dow Jones has also run.

The District Court's Order of April 6, 1984 provided that the defendants would have 60 days from entry of the Order

to submit a list of those documents that they contended are "trade secrets or so presently so commercially sensitive that their disclosure would cause substantial harm to defendants competitive positions." Order of District Court, Para. 3. Documents not submitted for further protection were to be declassified 70 days following entry of the Order. Order of District Court, Para 3. The District Court stayed its Order pending appeal.

In vacating the stay of the District Court's Order, by its mandamus on June 19, 1984, this Court thereby started the 60 and 70 day periods running. If plaintiffs are correct in their interpretation of this Court's mandamus, defendants may not now designate documents for further protection. Moreover, if plaintiffs are correct, the 70 day period has also run and therefore plaintiffs must turn over their pretrial briefs and summary judgment motions along with documents referred to therein to Dow Jones immediately.

Plaintiffs are presently in a situation where they must obtain some guidance from this Court. Under the protective order originally entered in this case, plaintiffs may not turn over documents produced in this litigation to third parties. However, under the District Court's Order, plaintiffs must turn over those documents to Dow Jones.[1]

---

[1]It is time that the District Court ordered that the 60 day and 70 day periods began to run on September 6, 1984. See Para. 1, page 5 of Memorandum and Order Re Effect of Stay, attached to the Defendants' Brief. The District Court, however, conditioned its ruling as to when the 60 day and 70 day periods began on the premise that "issuance of the mandate in this case was a clerical error." Memorandum and Order Re Effect of Stay at 3. If the mandate was not issued as the result of a clerical error, then the mandamus was effective June 19, 1984.

Plaintiffs need guidance from this Court as to the effective date of its mandamus which vacated the stay of the District Court's Order. If, as plaintiffs maintain, the effective date of the mandamus was June 19, 1984, plaintiffs must hand over documents to Dow Jones forthwith. Plaintiffs respectfully request this Court to clearly state that the effective date of its mandamus was June 19, 1984 and that the 60 and 70 day periods provided in the District Court Order began to run as of that date.

Dated: September 18, 1984

Respectfully submitted,

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By /s/ M. Brian McMahon
On Behalf of Plaintiffs

Exhibit A

United States District Court for the
Central District of California

MDL Docket No. 150
Long Beach
CV 75-2232 WPG
In re
Coordinated Pretrial Proceedings
in Petroleum Products Antitrust Litigation

[Filed Oct. 24, 1983]

ORDER (PROPOSED)
COPY

Having reviewed defendant MOBIL OIL CORPORATION'S STATEMENT REGARDING CONFIDENTIALITY OF DOCUMENTS TO BE DISCLOSED TO THE STATE OF ALASKA and having reviewed *in camera* the documents identified in APPENDIX I, thereto,

IT IS HEREBY ORDERED that the exhibits identified on Appendix I attached hereto, and numbered 2, 3, 6, 7, 8, 9, and 11 are to be executed from the set of confidential summary judgment materials access to which was granted to the State of Alaska at the September 14, 1983, hearing.

10/24/83

WILLIAM P. GRAY
United States District Judge

Exhibit B

United States District Court for the
Central District of California

MDL-150 WPG
All Cases
In re:
Coordinated Pretrial Proceedings
in Petroleum Products Antitrust Litigation

[Filed April 6, 1984]

ORDER

Having considered (a) motions by the plaintiff-intervenor Dow Jones Company, Inc. for access to material sealed pursuant to a protective order entered by this court, (b) a motion by the State Case plaintiffs pursuant to Paragraph 3 of the MDL-150 protective order to declassify certain documents, (c) memoranda supporting and opposing said motions, and (d) oral argument of all interested parties, and having set forth the applicable law in the court's MEMORANDUM OF DECISION entered February 10, 1984, which is incorporated herein by reference,

IT IS HEREBY ORDERED:

(1) Pursuant to the common law right to access and the MDL-150 protective order the following documents are subject to declassification: (a) Plaintiffs' pretrial briefs, including Florida's Supplement to the State Cases Plaintiffs' Initial Pretrial Brief, and documents and exhibits attached to and cited therein; (b) all summary judgment material filed under seal, including motions for summary

judgment, opposing and supporting memoranda and documents cited in or attached thereto; and (c) material related to motions for judgment on the pleadings filed under seal, including such motions, opposing and supporting memoranda, and documents cited in and attached thereto. These documents shall be unsealed subject to the procedures set forth in pargraphs (3) and (4) below.

(2) The court is informed that the plaintiffs in the State Cases have served upon defendants' liaison counsel one copied set of the documentary exhibits to Plaintiffs' Initial Pretrial Statement that were filed with the court on November 3, 1983. Defendants shall promptly reimburse plaintiffs for one half the cost of reproducing such documents.

(3) Within sixty days following the entry of this Order, defendants shall identify and submit to the court and serve on plaintiffs those documents identified in paragraph (1) that they contend are trade secrets or presently so commercially sensitive that their disclosure would cause substantial harm to defendants' competitive positions. When submitting the documents, defendants may also submit memoranda explaining why categories of material ought to remain sealed and identifying which documents fall into each category. The defendants shall serve any such memoranda upon liaison counsel in both cases. Documents identified in paragraph (1) but not submitted for further protection pursuant to this paragraph or paragraph (4) shall be declassified and unsealed seventy days following the date of entry of this Order.

(4) Prior to submissions to be made pursuant to paragraph (3), each party shall review the materials identified

in paragraph (1) that it submitted to the court and deliver to any non-party a copy of any documents cited therein or attached thereto that contain information produced by such non-party covered by the MDL-150 protective order. Such non-party may then take part in the briefing procedure described in paragraph (3) by moving to intervene for that limited purpose. Upon intervention, a third party seeking to retain the confidentiality of documents shall agree to pay to the party incurring such costs a reasonably proportionate share of the expenses entailed in the review, copying and delivery of documents to the third party.

(5) With respect to any document called to the attention of the court pursuant to paragraphs (3) and (4) hereof, the court will take such action as it deems appropriate regarding declassification, depending upon the number of documents involved and the showings made.

(6) This Order is hereby stayed for thirty days, and thereafter pending appellate review if defendants shall have joined in a request to the Court of Appeals for an expedited review.

DATED: April 6, 1984

/s/ WILLIAM P. GRAY
William P. Gray
United States District Court

Supplemental Appendix I

United States District Court
Central District of California

CV84-2232-WPG Long Beach
Case Number MDL Docket No. 150 WPG
In Re: Coordinated Pretrial Proceedings in
Petroleum Products Antitrust Litigation
Plaintiff(s)

vs

Defendant(s)

Notice of Entry

To the above named parties and to their attorney(s) of record:

You are hereby notified that Memorandum for Decision on Defendants' Motion for Partial Summary Judgment and Findings of Fact and Conclusions of Law in the above entitled case was entered in the docket on 7-19-84.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties.) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Supplemental Appendix J

United States District Court
Central District of California

MDL-150-WPG Long Beach
In Re Coordinated Pretrial Proceedings in
Petroleum Products Antitrust Litigation

[Filed Aug. 31, 1984]

Memorandum of Decision

The defendants have moved for summary judgment principally on the basis of the deposition testimony of the plaintiffs' experts, Messrs. Anderson and Rapp of National Economic Research Associates (NERA). The defendants moved to exclude the testimony of these two economists and the portions of the NERA Report that they authored concerning both liability and damages. They also sought to exclude the damage studies done by plaintiffs' other expert economists, T. Saving and Putnam, Hayes & Bartlett. These motions were argued on July 24, 25 and 26, 1984 and taken under submission. Subsequent to the hearing, I have studied the transcripts thereof, have given renewed consideration to the briefs submitted by the parties, and have sought to acquire a better understanding of the rather technical problems involved in the issues presented. The motions now are denied.

The defendants contend that the plaintiffs' economists recanted, or made admissions contrary to, some major assumptions and conclusions of the NERA Report and the plaintiffs' theories regarding both the fact and the amount of damage. I am not able to conclude that the "admissions"

of the experts are as categorical or substantial as the defendants contend. Some of the deposition answers upon which the defendants rely were given in response to questions that were long, involved and based upon hypotheses that made the answers conducive to interpretation. In a few passages cited by the parties, the hypothetical facts upon which the deponent was to base his answer were unsubstantiated in the record. Other answers were qualified or were contradicted in different parts of the very extensive interrogations. It is beyond doubt that portions of the deposition may call forth some interesting cross-examination at trial. However, taken as a whole, the testimony generally was consistent with the NERA Report, and I decline to base summary judgment upon isolated comments that can be considered to be at variance with the main thrust of the theories embraced by the plaintiffs and their expert witnesses.

If I were to conclude that summary judgment should be granted, I would feel obliged to articulate with considerable particularity the reasons why the deposition testimony is inconsistent with the Report or with reality. However, under present circumstances, it is believed more appropriate to refrain from doing so. In the first place, having decided that the plaintiffs' witnesses have not nullified their own methodology, and having no reason to conclude at this stage that the expert opinion is other than admissible, the weighing of the plaintiffs' experts' testimony and the evaluation of their opinions against the defendants' theories become the responsibility of the trier of fact. *See In re Japanese Electronic Products Litigation*, 723 F.2d 238, 275-84 (3d Cir. 1984). It therefore is not considered appropriate or necessary that I express my own views at this

time as to the strengths or weaknesses of the plaintiffs' positions on the ultimate questions. Second, if I were to undertake to set forth here in detail the reasons why I believe that many factual issues remain, the preparation of this memorandum would take a considerable amount of time. For personal reasons, I will not be able to work on this case for about a month, and I believe that it is better for the parties to have a prompt decision than to require them to wait a much longer time for a more thorough explanation. Accordingly, I shall advert somewhat telegraphically to the major points raised by the parties in order to give counsel whatever assurance I can that the matters have been given thorough consideration.

I. MARGINAL VALUES IN REDUCTION v. IN TOPPING

The plaintiffs' case on liability and for damages, at least as implicated by this dispute, is based largely on the following propositions:

(a) Every refiner of crude oil may be expected to attempt to maximize its profits.

(b) In such effort, the competitive refiner will keep on buying crude oil as long as the marginal value product of that crude oil does not fall below the price at which it can be purchased. That is, the competitive refiner will equate marginal value with price by adjusting its consumption of crude.

(c) Here, data from defendants disclose that during the times concerned, their marginal refinery values for heavy crude oils were substantially in excess of the posted prices for those oils.

(d) The foregoing circumstances are evidence of anti-competitive behavior and, together with other facts, point to collusion in violation of the antitrust laws.

(e) From the above, it is possible to construct a reasonable model for estimating the "but for" prices of heavy crude oil. In simple terms, had the defendants been acting competitively, the prices of crude oil would have risen to the level of the marginal value of the oil, and the "but for" competitive price is roughly equal to that marginal value.

The defendants' position is that these higher internal refinery values, calculated in "reduction" refineries, cannot be used either as evidence of conspiracy or as estimates of the "but for" prices. Defendants first argue that the refinery values of the smaller, less sophisticated refiners ("toppers") are the proper indicators of competitive market value. The question is, therefore, whether the expert economists agreed or admitted, as the defendants assert, that in the "but for" competitive world the market prices would have been determined by the (lower) marginal values of topping refiners.

I have reviewed substantial portions of the deposition transcripts, and I find the expert testimony consistent with the plaintiffs' position that in competition, all refiners would have the same values for a given crude oil at the margin—even though some of the less efficient refiners might not have survived in that "but for" world. The transcripts show that Mr. Anderson distinguished between what did happen and what would have happened, in his opinion, in a competitive market. *See, e.g.,* Anderson deposition at 1911-18, 2124-27, 2237-41. Mr. Rapp, as well, evi-

dently kept that distinction in mind during the part of his deposition cited by defendants. *Compare* Rapp deposition at 565-75 *with id.* at 1327. In fact, the only passage from the thousands of pages of deposition transcript here that reveals agreement with defendants' proposition regarding marginal values in a "but for" world is a rather vague statement by Mr. Rapp, at page 1924 of his deposition, that in the 1960's and 1970's, the demand of toppers "should have contributed to the price" of heavy crude oil "in competition." This simply is not enough from which to conclude that the experts admitted that their methods and data were "fatally flawed."

The defendants' second argument regarding the topping value of crude oil is that the plaintiffs cannot postulate a "but for" world in which the toppers would have been driven out of business as a result of the defendants consuming more heavy crude and bidding up its price, since plaintiffs' experts have conceded that they have no reason to believe that defendants conspired to restrain their demands for crude oil. Therefore, according to the defendants, plaintiffs cannot maintain that toppers would not have existed in a competitive market, and thus the competitive market price would have reflected the value of the oil to the toppers.

Turning to the depositions, it is clear that the economists testified that they had no reason to believe that the defendants conspired with the purpose of underconsuming heavy crude oil. *See, e.g.*, Anderson deposition at 2344, 2354, 2362-63; Rapp deposition at 1126. Neither do the experts think that the aggregate market consumption of crude oil would have been much higher had the market been competitive, given the relative inelasticity of supply. *See, e.g.*, Anderson

deposition at 2338-39, 2344. But, they believed that each defendant restrained its demand for heavy crude as a by-product of the conspiracy not to bid up the prices of heavy crudes. *See, e.g.,* Anderson deposition at 2366-72. This testimony is consistent with the plaintiffs' theory that *competing* refiners would purchase crude oil to the point where its marginal value equalled its market price, and that had the defendants acted accordingly, the prices of heavy crudes would have been higher.

II. THE "STEP" FUNCTION

The defendants contend that the graphic representation of their marginal values for a given crude would not descend in a smooth line or a curve, but rather would descend in "step" fashion, reflecting the different operating modes in a reduction refinery. Mr. Anderson did testify to his understanding that there were steps, *see* Anderson deposition at 84-85, but he also expressed his view that a refiner probably has a lot more flexibility in deciding which modes or combinations of modes to utilize than is indicated by the simple four-step illustration submitted by the defendants. *See e.g.,* Anderson deposition at 1175, 1972, 1975, 1981. I am aware of no evidence as to how many such steps there are in any refinery, how broad they are, or how deep the precipices. These questions are important in considering the relationships between "reduction" and "topping," discussed in Section I, *supra.* They also are important to the matter of fixed costs and return on investment, discussed in Section III, and in considering the significance of supply elasticity, treated in Section IV. The "step" concept clearly presents factual issues that constitute further reason why summary judgment is inappropriate.

III. FIXED COSTS AND RETURN ON INVESTMENT

I am unable to accept the defendants' contention that the refinery data that plaintiffs used were inappropriate because the figures failed to take into account fixed costs and return on investment, which must be recovered if the refiner is to stay in business. For purposes of the joint motion, defendants conceded that their refinery values (used by the plaintiffs) were in fact values calculated at the margin. If the data are marginal values, or if they are suitable surrogates, fixed costs and return on investment are not relevant; these expenses should be covered by average values, not marginal values, as a matter of elementary economic theory.

The defendants, however, take a different tack, arguing that the usual economic theory does not apply: due to the "step" function, their marginal values were the same as their average values for crude oils across each "step" or refining mode. Thus, according to the defendants, unless they recovered their fixed and capital costs in each mode they would not recover these costs at all. The defendants assert that Mr. Anderson admitted as much in his deposition, and that they are therefore entitled to a ruling barring the admission of any expert study or opinion of damages based on the refinery value data collected by the plaintiffs from the defendants.

It is evident from the transcript that the defendants have simplified the economics (for which, perhaps, I should thank them) and the responses of the expert. Mr. Anderson did not agree that the reduction refinery values had to exceed price by an amount sufficient to cover these costs over each "mode." *See* Anderson deposition at 1979-81.

The qualified response he gave there is consistent with the proposition that the reduction refiner can recover its costs with revenue represented by the difference between the marginal values and the higher infra-marginal values, *see id.* at 1981, from which we accordingly infer that he did not concede the main point urged by the defendants here.

Insofar as Shell and Socal do not join in the arguendo assumption that their refinery values are marginal values, their contentions raise material issues of fact that are somewhat tangential to the thrust of the instant debate. This is, to be sure, an important issue, and I am not precluding reargument of the question at a later date.

IV. SUPPLY ELASTICITY

The defendants argue that NERA's conclusion that the supply of heavy crude oil in California was price-inelastic is (a) crucial to the damage estimate; (b) extreme; and (c) not supported by—or is contradicted by—the evidence. Plaintiffs' experts did acknowledge that in order for their calculations of damage to be reliable, the supply of heavy crude oil in California would have to have been substantially price-inelastic during the relevant period. NERA Report at p. 433. The defendants, relying on *Murphy Tugboat v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1081 (1982), request that the NERA testimony on supply elasticity (and any evidence for which that is a foundation) be excluded. This I decline to do. Unlike the situation in *Murphy Tugboat*, there is evidence in the record to support the opinion.

Plaintiffs have proffered empirical evidence showing that despite very significant increases in the prices during the period 1970-80, the production of heavy crude oil in Cali-

fornia remained quite constant. And, during the 1960-70 period, when prices for heavy crude were stable, the production increased dramatically. In addition, there is some documentary evidence to substantiate this conclusion. *See* the Union Oil Company memorandum concluding that "[t]he supply of heavy crude oil has not been affected by the posted price for this oil." (Quoted in NERA Report at p. 433.) On the other hand, there is evidence that officials of the City and State made opposite representations to the federal government in the 1970's in an attempt to obtain relief from the price ceilings. At best, the evidence is in conflict as to what extent the supply of heavy crude oil was responsive to price.

The defendants further allege that the NERA economists failed to deal properly with four factors that should have led them to conclude that there was a higher elasticity: (1) NERA erred in ignoring a possible shift in the supply curve; (2) NERA underestimated the natural production decline rate; (3) NERA overestimated the amount of crude oil that could respond to higher prices by virtue of the federal price controls; and (4) NERA underestimated increased oil production costs in using the GNP-deflator to account for inflation.

I am unable to agree that the NERA experts did not give consideration to these factors and make professional decisions regarding their treatment. For example, the testimony of Mr. Rapp at pages 87-120 and 370-71 of the transcript shows that he did not concede an error in this regard to a shift in supply. As for the natural production decline rate, it seems that Mr. Anderson maintained throughout that his regression methodology was appropriate and reli-

able for his professional purposes. *See, e.g.*, deposition at 4326-36, 4474-75, even though, as he candidly admitted, one of the computer simulations produced an aberrational result. *See id.* at 4448-49. Regarding the effect of federal price controls, Mr. Anderson maintained during his deposition that he had made the proper comparison between "new oil" prices and incremental production. *See id.* at 4073-78, 4295-96. Mr. Anderson did not concede that if he had made the adjustments that the defendants suggest are necessary, he would have reached a conclusion that is more favorable to the defendants. *See id.* at 4166-70. Nor did Mr. Anderson concede that had he used an index of cost increases that was higher than the GNP deflator, NERA's estimate of supply elasticity would have been higher. *See id.* at 4213, 4215. In sum, the NERA opinion on supply inelasticity has not been shown to be so fatally flawed as would warrant exclusion. The defendants' challenges go to the weight to be given the opinions, and those are not questions suitable for decision on this motion.

V. CONCLUSION

The defendants have expressed their concerns about the great expense of this long-pending litigation. I share these concerns, and I am increasingly mindful of the complexities and difficulties in terms of proof of liability and damages. However, I conclude that the deposition testimony of Messrs. Anderson and Rapp, two seemingly competent and conscientious economists, does not provide a basis for summary judgment. I also deny the motion to strike their testimony and that of the other experts.

To the extent that the presentation and argument during the July 1984 hearings added to the existing debate regard-

ing the legality of the three-cut exchange, I will discuss them in a separate memorandum.

With respect to the recent de-designation by the plaintiffs of certain expert witnesses, it is ordered as follows:

1. No additional experts may be designated by the plaintiffs.

2. If the deposition of an expert has been taken or has commenced, there will be no transfer of subject matter from such expert to another expert. The reason for this is to avoid the need for the defendants to start again to depose a new witness in covering subject matter that previously has been developed in whole or in part.

3. No report will be received into evidence that has been prepared by an expert whom the defendants have not had an opportunity to depose.

4. Any further depositions of experts designated by the plaintiffs will be limited as follows: Each defendant will be entitled to depose such expert for not more than one day of not more than six hours. The defendants shall be entitled to defer to each other in the utilization of their respective allotted days.

6. (*sic*) All of the foregoing is subject to modification by the court on good cause shown.

Dated: August 30, 1984

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

Office - Supreme Court, U.S.
FILED
OCT 10 1984
ALEXANDER L. STEVAS
CLERK

No. 84-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY
and TEXACO INC.,

Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit

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October 10, 1984

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TABLE OF CONTENTS

	Page
I. DOW JONES HAS FAILED TO DEMONSTRATE THAT PROCEEDINGS IN MANDAMUS ARE NOT SUBJECT TO RULE 41(a)	3
II. OTHER ARGUMENTS MADE IN THE OPPOSITION MISS THE POINT OF THE PETITION FOR MANDAMUS	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Page

In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) 6
In re Greensboro News Co., 727 F.2d 1320 (4th Cir.), *pet. for cert. filed*, 52 U.S.L.W. 3908 (June 4, 1984) 4
In re York International Building, Inc. v. Chaney, 527 F.2d 1061 (9th Cir. 1975) 5
Local 391, International Brotherhood of Teamsters, Etc. v. Ward, 501 F.2d 456 (4th Cir. 1974) 4
Ohio Environmental Council v. United States District Court, 565 F.2d 393 (6th Cir. 1977) 4
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 7
Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976) 4
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911) 2
United States v. Harper, 729 F.2d 1216 (9th Cir. 1984) 4

Statutes

28 U.S.C. § 1651 ..... 1, 3
28 U.S.C. § 2077 5

Rules

FED. R. APP. P. 21 4
FED. R. APP. P. 21(b) 1, 7
FED. R. APP. P. 34 7
FED. R. APP. P. 41 ..... 2, 3, 4, 5, 8
FED. R. APP. P. 41(a) 3, 4, 5
FED. R. CIV. P. 26(c) 8
FED. R. CIV. P. 26(c)(7) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-479

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY
and TEXACO INC.,
Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

On October 5, 1984, a panel of the Court of Appeals recalled the mandate of its June 19 Order—the order sought to be reviewed herein—and affirmed (1) the grant of a petition for mandamus without answering briefs pursuant to Rule 21(b), and (2) the use of 28 U.S.C. § 1651 to overturn a discretionary stay pending appeal entered by the District Court to preserve jurisdiction over a significant decision involving disclosure of documents under the doctrine of public access. The immediate, and doubtless intended, effect of this Order is to eliminate the object of the instant petition for a writ of mandamus by vacating the June 19 Order. A copy of the October 5 Order is attached hereto as APPENDIX G.

Our Petition points out that the questions it presented fall within that small category of cases that recur without possibility of review because in most instances controversy is mooted before an appeal could be taken. Thus, this Court could exercise its discretion to consider these questions under the doctrine that controversy remains where government action is of such limited duration that it is "capable of repetition, yet evading review . . . ." *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

Such discretionary exercise of jurisdiction is not necessary with respect to the questions presented and numbered 2, 3 and 4 in the Petition. Petition p. (i). This is because each of these questions arises from the October 5 Order as well and, therefore, petitioners may now pursue their review in this Court on a petition for a writ of certiorari. The fact that the order to disclose documents is not instantly effective, due to the sixty-day review procedure and the resulting seventy-day deferral of disclosure built into the disclosure order, now makes such appeal practicable.

Exercise of discretionary jurisdiction with respect to the first itemized question—whether appellate Rule 41 applies to proceedings on petitions for extraordinary writs —would be appropriate. The Order of October 5 maintains the view that Rule 41 does not apply to proceedings for mandamus but appeal of the Rule 41 issue from the October 5 Order may be foreclosed because petitioners now have notice that the mandate will issue "forthwith." APP. G.[1] With this reply, the Rule 41 question has been

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[1] In most instances, and as happened with respect to the now-vacated June 19 Order, a party would not have notice of improper, premature issuance of the mandate, pursuant to the Ninth Circuit's unpublished practice to treat mandamus proceedings as not subject to Rule 41, and would be injured where issuance of a mandate involves irreparable loss of injunctive relief. It was only the unique factual circumstance of an automatic 70-day deferral of

fully briefed. As set forth in the Petition, pages 10-12, 16-19, resolution of this question will eliminate a clear conflict with the Second Circuit, ensure consistent administration of Rule 41 and ensure that petitioners and other litigants in the Ninth Circuit are not further injured by a practice that can foreclose rights of appeal.

For the foregoing reasons, this reply brief addresses primarily the question of the scope of Rule 41, in Part I, responding to the arguments raised by Dow Jones & Company, Inc.'s opposition, pp. 26-30 (hereinafter "Opposition"). Part II briefly touches on other misleading aspects of the Opposition.

I. DOW JONES HAS FAILED TO DEMONSTRATE THAT PROCEEDINGS IN MANDAMUS ARE NOT SUBJECT TO RULE 41(a)

Dow Jones has no authority for the proposition that proceedings under 28 U.S.C. § 1651 are not subject to Rule 41. Its contention that review by way of a petition for mandamus is not an appellate proceeding is contrary to common sense and well-settled authority. Petition, pp. 18 & n.22. Dow Jones argues that mandamus proceedings are not appeals subject to general provisions such as Rule 41 because the automatic stay provisions of Rule 41 are "utterly unworkable" and make no sense in a mandamus proceeding. Opposition at 26-27. But this confuses the issue of the nature of the proceedings, which are obviously appellate, with Dow Jones' separate claim that its particular petition required expedited treatment. A need for expedited treatment, however, does not require resort to mandamus. Any type of appellate proceeding can obtain expedited implementation of a final ruling. Rule 41 is flexible and permits a court of appeals to dispense with the usual delaying of the effect of final orders, *but it must so state in an order.* Rule 41, FED.

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disclosure built into the particular injunctive relief vacated by the June 19 Order that gave petitioners an opportunity to seek extraordinary review.

R. APP. P. ("unless the time is shortened or enlarged by order"). Thus Dow Jones' suggestion—that the "emergency" nature of its petition justifies its contention that Rule 41 does not apply—misses the mark.

It is plain on the face of the appellate rules that mandamus proceedings are encompassed by Rule 41(a). Petition at 17-18. Dow Jones' only rejoinder is that, since Rule 21 applies specifically to proceedings involving extraordinary writs, it is the *only* appellate rule governing such proceedings. Opposition at 27. Such reasoning is specious and would leave proceedings for extraordinary writs without sufficient procedural guidance to reasonably advise litigants how to proceed.

Dow Jones' claim that in other decisions on extraordinary writs Courts of Appeals have acted "without specifying when the mandate shall issue" (Opposition at 28) is equally pointless. In the absence of an order specifying the time when the mandate shall issue, Rule 41 specifies the time. Indeed, that is the essence of petitioners' position. Thus, the rule results in a workable scheme in which litigants always have notice of the timing of the issuance of the mandate while there is preserved flexibility to shorten or enlarge the time, as circumstances require. In none of the cases cited by Dow Jones is the application of Rule 41 an issue, nor were petitions for rehearing filed. Where the court did not specify a time there is nothing to indicate that the automatic provisions of Rule 41 were not applied.[2]

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[2] These cases, erroneously cited by Dow Jones, include *United States v. Harper*, 729 F.2d 1216, 1226 (9th Cir. 1984); *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1009 (3d Cir. 1976); *In re Greensboro News Co.*, 727 F.2d 1320, 1322, 1326 (4th Cir.), *pet. for cert. filed*, 52 U.S.L.W. 3908 (June 4, 1984) (No. 83-1995). In *Local 391, International Brotherhood of Teamsters, Etc. v. Ward*, 501 F.2d 456, 459 (4th Cir. 1974) no writ issued at all, but an interim stay that was not subject to Rule 41 was lifted without delay.

The argument that the June 19 order is "interim" is also wrong. That order granted all the relief sought by Dow Jones in its petition, making it the final judgment in Ninth Circuit docket No. 84-7262. Accordingly, the decision in *York International Building, Inc. v. Chaney*, 527 F.2d 1061 (9th Cir. 1975), presented and quoted in the Opposition at 29, is of no relevance. *York* was a decision on an interim motion in a pending bankruptcy appeal. Precisely because it was not a final judgment, the Ninth Circuit correctly concluded that Rule 41 did not apply.[3] Moreover, it is plainly incorrect for Dow Jones to argue that the June 19 Order is "interim" because "it in no way resolves the issue of public access to these documents." Opposition p. 29. The merits of public access should not have been resolved in the mandamus proceeding below because only the propriety of the stay pending appeal was presented by Dow Jones. Indeed, the more recent October 5 Order (APP. G) is improper precisely because, and contrary to even Dow Jones' intent in petitioning the Ninth Circuit, it indicates that the June 19 Order did resolve, or at least prejudge, the public access issue as well as the issue of the stay pending appeal.

Dow Jones' Opposition is silent on the significant issue of notice and the problems caused by a Ninth Circuit practice that is unpublished, in violation of 28 U.S.C. § 2077 (SA-1). Finally, it fails to address the existence of a conflict with the Second Circuit on the scope of Rule 41. Defendants-petitioners reasonably relied upon the language of Rule 41(a) in concluding that a petition for rehearing automatically stayed the mandate of the June 19 Order, leaving Judge Gray's stay pending appeal in effect.

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[3] If Dow Jones had pursued the more logical route to attacking the stay pending appeal—a motion to vacate filed in the merits appeal docket, Ninth Circuit No. 84-5878—then any order granting such motion would have been interim in that docket; defendants would have known that Rule 41 provided no automatic deferral of its effect and could have initiated action accordingly.

II. OTHER ARGUMENTS MADE IN THE OPPOSITION MISS THE POINT OF THE PETITION FOR MANDAMUS

Dow Jones' argument that defendants are unlikely to succeed on the merits of the underlying public access appeal, Opposition pp. 21-26, requires only limited comment. First, the presentation of the District Court decision as conferring a right of "contemporaneous access" (Opposition p. 2, 3, 22, 25) is incorrect for the reasons set forth in the Petition at p. 23 & nn. 31-32. Dow Jones has resorted to deliberate misrepresentation of a recent case in an attempt to rehabilitate this analysis.[4]

It is equally incorrect for Dow Jones to discuss the ruling below, and the question on appeal, in terms of access at the "adjudicative stage." Opposition pp. 1, 22, 24-26. This phrase is too vague to be useful in assessing the questions below, since it applies to the period prior to adjudication without apparent limit. By this approach Dow Jones argues that immediate access is harmless because most of the protected material will be disclosed eventually because pending motions that include sealed material will be decided or because the antitrust case will end and the presumption of access will then attach. One could make these arguments at any time items are filed at the courthouse, however remote in time or reasonable expectation from dispositive ruling. By this approach,

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[4] The opposition, p. 22, quotes from *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1310 (7th Cir. 1984), adding the bracketed comment re access "[*i.e.*, prior to decision]." Public access in that case was ordered and affirmed because the report in issue had *already* been the subject of dispositive evidentiary ruling, following evidentiary hearings in open court. 732 F.2d at 1309 ("We hold, therefore, that the presumption of access applies to the hearings held and the evidence introduced in connection with Continental's motion to terminate."). Indeed, Dow Jones was a party to this case, 732 F.2d at 1304, and its "claim for access to the Report [was] predicated on the Report's introduction into evidence at the June 30 hearing," and not its relevance to a submitted but undecided motion. 732 F.2d at 1305 n.4.

control over disclosure of items subject to a protective order passes from the court to opposing counsel who may force disclosure merely by submitting materials with some motion or other filing. Moreover, there is no assurance that motions will be ruled upon or that a case will end due to action by the government rather than external developments.[5] Where the purpose of access is to monitor government action—in this context judicial performance, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)—extension of public access *prior* to dispositive judicial action rests public access on a slippery slope that extends to all phases of pretrial.

On the more immediate question arising from appellate Rule 21(b), Dow Jones now argues that the June 19 Order was not *ex parte* because seven briefs purportedly addressing the stay pending appeal had been filed. Opposition p. 15. Dow Jones is untroubled by the fact that the few filed before the June 19 order (1) were filed in other dockets and (2) did not address the issues raised by Dow Jones' petition for mandamus. The unfairness of such an argument is discussed in the Petition p. 15. On the related question involving oral argument, Dow Jones misrepresents petitioners' position. We do not assert a right to oral argument *per se*, but only the rights conferred by Rule 34.

Finally, the contention that no confidential documents will be released pursuant to the disclosure order is misleading and begs the question on the appeal that petitioners seek to preserve. See Opposition at 13-14. The documents subject to the District Court's disclosure order

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[5] Cases may settle or be voluntarily dismissed, motions may be withdrawn or mooted, all without dispositive judicial involvement. Denial of a motion for summary judgment is usually a non-dispositive act simply stating that disputes remain that must be resolved at trial. For all these reasons Dow Jones is incorrect in asserting that petitioners have admitted that the documents will be released someday and that only timing is at issue.

have been, and will be until expiration of the seventy-day period, subject to a valid protective order under Rule 26(c), FED. R. CIV. P. Under its general standards the materials are confidential and some are commercially sensitive under the more specific standard of Rule 26(c)(7). The effect of the District Court's ruling is to make findings under Rule 26(c) irrelevant once material is filed at the courthouse because, at that point, confidentiality is defined under the far more stringent standard of presumptive public access. Items that are confidential or commercially sensitive under the Rule 26(c) standard may not—indeed, likely will not—be so under the public access standard. The issue on appeal is which standard applies during the pretrial phase of civil litigation, and precisely when (and why) does the presumption of public access override Rule 26(c).

When Dow Jones repeatedly declares that no confidential or commercially sensitive items will be disclosed, it is applying the public access standard. Defendants-petitioners are equally correct in stating that, absent relief, the documents that will be disclosed are confidential, as defined under Rule 26(c). We did not ask this Court to resolve which definition or standard of confidentiality applies—only to take steps necessary to preserve jurisdiction over this question.

CONCLUSION

A portion of the petition for a writ of mandamus may be dismissed as a result of the Ninth Circuit's October 5 Order vacating its Order of June 19. With respect to the question of the scope of Rule 41, however, this Court should exercise its discretion to hear this question, resolving a conflict between the Second and Ninth Circuits, by ruling that proceedings for extraordinary writs are subject to Rule 41, FED. R. APP. P.

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re:

COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION.

No. 84-5878

DC # MDL-150 WPG
Central California

STATE OF ARIZONA; STATE OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees,

vs.

ATLANTIC RICHFIELD CO., *et al.*,
Defendants-Appellants.

No. 84-7262

DC # MDL 150 WPG
Central California

DOW JONES AND COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

STATE OF ARIZONA; STATE OF CALIFORNIA, *et al.*,
Real Parties In Interest.

Before: SCHROEDER, ALARCON and FERGUSON, Circuit Judges

ORDER

[Filed October 5, 1984]

Defendants have petitioned for rehearing of our order of June 19, 1984, in case 84-7262 and suggest the appropriateness of rehearing en banc. Defendants also move for recall and clarification of the mandate in that case, and seek a stay pending appeal in 84-5878.

The petition for rehearing is denied. Defendants contend that the petition for writ of mandamus was improperly granted without requesting them to respond under Fed. R. App. P. 21. Defendants had previously responded to substantially similar arguments in a prior petition (No. 83-7634) and raised in their opposition to petitioner's application to vacate stay their arguments in support of the district court's order. Defendants' contentions have been fully considered by the court.

Defendants' remaining contentions in the petition for rehearing go to the merits of petitioner's request for mandamus relief. As noted, those contentions were previously considered and rejected.

The public and the press have the right to inspect public records and documents, including pretrial judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 2613, 73 L.Ed. 2d 148 (1978); *Associated Press v. United States District Court for the Central District of California*, 705 F.2d 1143, 1145 (9th Cir. 1983). The right of access is grounded in both the common law and the first amendment. *Associated Press*, 705 F.2d at 1145.

This right is not absolute, however, and must yield when access by the public or press would either harm a litigant's competitive standing through the release of

sensitive business information or conflict with a defendant's right to a fair trial. *Nixon*, 435 U.S. at 598; *Associated Press*, 705 F.2d at 1145.

Where access to pretrial documents in criminal cases is denied, this court requires that the party opposing access establish that nondisclosure is "strictly and inescapably necessary in order to protect the fair trial guarantee." *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982), *quoting Gannett Co. v. DePasquale*, 443 U.S. 368, 440 (1979). The standard in civil cases should be no less demanding.

Defendants were not required to make any showing with respect to the documents at issue here. The blanket protective order allowed defendants to place items under seal unilaterally.

This court has previously ordered disclosure of similar documents in a civil proceeding. In *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9th Cir. 1974), this court required disclosure to a nonparty of documents in an antitrust action despite the defendant's contention that the documents contained trade secrets and other sensitive, competitive information. *Olympic*, 332 F.2d at 265-66.

The Sixth and Seventh Circuits have required the disclosure of sealed documents in similar contexts. *See Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).

Unlike the situation in *Seattle Times Co. v. Rhinehart*, —— U.S. ——, 104 S. Ct. 2199, 2207-08 (1984), the documents at issue here are not the raw fruits of discovery, but are public components of a civil trial.

There was no principled basis, either in defendants' oppositions to the intervenor's motion to vacate the stay or

the defendants' response to the previous mandamus petition, for denying immediate implementation of the disclosure procedure.

The court's mandate issued with the June 19 order granting the writ of mandamus. Defendants' motions for recall and clarification of the mandate are granted. The parties shall forthwith begin to implement the procedures for review and disclosure of documents established by the district court's order of April 6, 1984. The sixty-day and seventy-day periods specified in that order will begin to run upon the entry of this order. A certified copy of this order shall constitute the mandate of the court.

Defendants' motion for stay of the district court's order pending the disposition of appeal 84-5878 is denied.

The panel has voted to reject the suggestion for rehearing en banc. The suggestion will be disposed of by separate order after consideration by the full court.